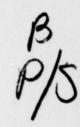
United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

75-1412



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1412

UNITED STATES OF AMERICA,

Appellee,

--V.-

JOHN CAPUTO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

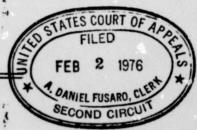
APPENDIX FOR A PELLANT

GINO E. GALLINA, ESQ.

Attorney for Appellant John Caputo
30 Broad Street

New York, New York 10004

(212) 944-1550



PAGINATION AS IN ORIGINAL COPY

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7/74 Before COSTANTINO, J Indictment fi	160
11-74 Notice of Appearance filed, 11-74 Before MISHLER, CH J - case called	data & coursel Gine Calling it
present - deft arraigned and enter	s m nles of not guilty - bail
conditions continued - 30 days for	motions - Jan. 6, 1975 for triel.
	- Trail 2 119-119
23-74 Covts Notice of Readiness for tris	
14:78 Magistrate's file 74 M 620 inserted	into CR file.
19.75 Notice of Motion filed, to dismiss t	aing neet record of deft to
by statements, preclude the Govt from u	
legesch his credibility etc. (all re	E. 2-24-1)
20-7 - Branch J -Order filed that t	SERHIBCHIAFFING answer all
WIT THE TENER LABOUR TO WAS A PART ON NOW ALLEY OF TH	a above criat: further ordered

74CR 621

DATE	PROCEADINAS
	producing books, papers, etc. and further Ordered that no testimony or
1827	other information compelled under this Order (or any information direct-
Sec.	ly or indirectly derived from such testimony may be used against him
-20-75	Stenographers transcript dated Oct. 11, 1974 filed.
2-21-75	Govts Trial Brief filed.
-2-21-75	
2-21-75	
Ţ	Brooklyn, Strike Force and John F. Malone, Asst. Director in Charge
as .	F.B.I. calling for production if internal Govt documents at the trial
1	of the above named deft. (ret. 2-24-75)
2-24-7	Before BRAMWELL, J - case called -/motion to quash subpoena and defts.
-	motion to preclude the Govt from using past record, etc. Motions
Tarit Sales	argued - motions granted.
2-25-75	Before BRAMWELI, J - case called - motion to dismiss the Indictment
	argued - Decision Reserved.
2-25-75	Before BRAMWEIL, J - case called - motion to suppress, etc. evidentians
,	hearing on suppression begun - hearing continued to 2-26-75 @ 10:00 mm;
2-26-75	
	hearing concluded - decision reserved.
2-26-75	Before BRANWELL, J- case called & adid to April 14, 1975 for trial
228/75	Memoran dum of law filed
2/28/75	Namorandum of law and Exhibits to Memorandum of law of law filed
3/4/75	Stenographer's transcripts of Feb. 25, and 26, 1975 filed.
3-13-75	By BRAMNELL, J - Memorandum and Order filed denying both of deits.
1	motions. (for suppression and to dismiss etc)
3/14/75	Memorandum of law filed
/24/75	Covt's memorandum of horizontion to deft's motion to dismiss
3-28-75	Hearing in Chambers March 7, 1975; Ordered sealed by Hon. Henry
" ·	Bramwell. (placed in vault)
4-14-75	Refore BRANWELL, J - case called & adjd to May 5, 1975 for trial.
+5-5-75	Before BRAMWELL, J - case called & adjd to May 27, 1975 for trial.
A.C.	Deft & counsel Cino Gellina present.
5/27/75	Before BRAMWELL, J Casekalled-adjd to 7/21/75 at 10:00 A.M. for trial
7/21/75	
7/21/75	Before BRAMWELL, J Case called- adjd to 9/29/75 at 10:00 A.M. for trial
8-7-75	By BRAMWELL, J - Memorandum and Order filed denying defts motion to
\$1300 m	dismiss/- defts motion to dismiss counts I and 2 is denied without
D-2.	prejudice, with leave to renew during the course of the trial.

DATE	A 3PROCESUINGS	
	Before BRAMWELL, J Case called- adjd to 10/14/75 for trial	at 10:00 A
9/29/7	Notice of Motion filed to conduct a hearing re conflict of	14
2.6		
	BeforeBRANWELL, J Case called govt's motion on conflict of	interest :
0/14/75	etc motion denied - submit order on motice - case act to 10/2	0/75 at
The second	etc motion denied - submit of det	
	10:00 A.M	trial :
10-20-7	Before BRAMWELL, J - case called & adid to Nov. 3, 1975 for	
1	By BRAMWELL, J - Order filed that Gino Callina not be disqual	ified Tre
10-49-7	By BRAMWELL, J - Order Filed Chat Gino Garring Morder dated Oct. 28.1	975)
THE STATE OF	From representing the deft JOHN CAPUTO. (Order dated Oct.28,1	
11-3-	Before BRAMWELL, J - case carred - dere selected and sworr	1 - 1949
Property of	ordered - selection of Jury begun - Jurors selected and sworr	-
の名が	Trial contd to Nov. 5, 1975.	a nresent-
73/75	Before BRAMWELL, J Case called - Deft and counsel Gino Gallin	ffine orde
A CAN	Trial resumed-bench warrant for material witness Joseph Schia	THE PERSON AND ADDRESS.
	trial contd to 11/6/75 at 9:30 A.M.	14.50 A
M1-6-	75 Before BRAMWELL, J - case called - deft & counsel present -	42 - 2275
Sep. 14.44	Inspection - motion denied - trial resumed - defts motion for	or
The said	Inspection - motion denied - trial testing erented -	North !
the state of the	mistrial and for withdrawal of a Juror etc. motion granted -	075
A Comment	Jury discharged - trial concluded - case adid to Nov. 10, 1	1
STEWN TO	for trial.	100
11/6/7	Senographers Transcript dated 11/6/75 filed	and counse
11/7/75	Before BRAMWELL, J Case called - Material Witness Schiaffino	rrant- ben
Albert .	Dennis Peterson present- deft brought into court on bench wa	to appear
17 3	warrant vacated- govt's application for bail denied- witness	Livery .
Par ID	on 11/10/75 at 10:00 A.M Witness is released	11.00
11/1	/// Bench warrant retd and filed- executed	micaal
11-10-	Before Branwell, J - case called - defts motion for the dis	wta
71 × 14	of the Indictment etc. Motion argued - decision reserved - Go	se in in
PAT INC.	Brief by Nov. 14, 1975 - Reply Brief by Nov. 18, 1975 and ca	4
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DED: ALS: 4tj F. 741660

INDICTMENT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

JOHN CAPUTO,

Defendant

Mishler, 5

INDICTORNT

18 U.S.C. §1623

74 08621

October 8,1972

THE GRAND JURY CHARGES:

COURT ONS

- 1. On the 29th day of April, 1974, in the Eastern District of New York, a Grand Jury of the United States of America was conducting an inquiry to determine among other things, whether, in connection with the case of United States of America -v- Joseph Doe, Criminal No. 731995, there had been committed in the Eastern District of New York violations of 18 United States Code, Section 201 (Bribery of Public Officials and witnesses) and other Federal criminal statutes.
- 2. It was a matter material to said Grand Jury investigation to determine whether or not JOHN CAFUTO had told representatives of the Federal Bureau of Investigation that he had been able to handle the Fifth Precinct, New York City Police Department, in regard to gambling matters, and that he may have paid off employees of the Police Department in matters pertaining to the operation of a parking lot located at 33 South Street, New York City, New York.
- 3. On the 29th day of April, 1974, JOHN CAPUTO, while under oath, did knowingly declare before said Grand Jury with respect to the aforesaid material matter, as follows:
- Q. Let me refresh your recollection. I'm showing you now a copy of a Federal Bureau of Investigation report of an interview dated February 19, 1973 of John Caputo and it bears the name of Special Agent Robert Ross Frank and number one man Robert C. Sweeney.
 - A. Bob Sweeney?
 - Q. Right.
 - A. You read it to me, Mr. Dillon.

Q. On page 38 of that report, it states on the first full paragraph on that page, "Caputo admitted that he had been able to handle the 5th Precinct, New York City Police Department in regard to gambling matters. He denied knowing Sergeant Dugene Statile of the 1st Precinct, New York City Police Department and said he had no contact with the lat Precinct other than the operation of parking lot located within the confines of the 1st Precinct.

"Caputo admitted he may have paid off a small amount to the Police Department in operation of this parking los."

Did you may that to them about paying off?

- A. The biggest lie in the world again. You are telling me about two of the finest men. I looked up to the two men as the greatest men in the F.B.I. If they could say that, my God, then my name is mud. I never told it to them. How could they say a thing like --
 - Q. We will get off that now.
- A. My God, if they said a thing like that, it's a biggest lie in the world.
- 4. The aforesaid declaration by JOHN CAPUTO, as set forth in paragraph three (3) of this count, was false and known by him to be false when made.

(Title 18, United States Code, Section 1623)

COUNT TWO

- 1. The allegations contained in paragraph one (1) of Count.
 One herein are repeated and realleged as though fully set forth herein.
- 2. It was a matter material to said Grand Jury investigation to determine whether or not JOHN CAPUTO had told representatives of the Federal Bureau of Investigation that he had paid police officers when he was involved in the gambling business.
- 3. On the 29th day of April, 1974, JOHN CAPUTO, while under oath, did knowingly declare before said Grand Jury with respect to the aforesaid as follows:



- Q. Did you tell Assistant John F. Malone that you paid police officers when you were involved in gambling business:
 - A. Naver, my God. That question hever came up.
 - Q. Did you tell that to Special Agent Villaro?
 - A. You mean him?
 - Q. Right.
 - A. You heard what I just said?
 - Q. The onswer is no?
- A. He never asked me that question. He never asked me nothing about paying cops or nothing.
- Q. You -- your enswer basically would be that in that conversation on March 3, 1973 you did not tell John Malone or Tony Villano that you had paid off police officers when you were involved in a gambling business?
 - A. Never. Never.....
- 4. The aforesaid declaration by JOHN CAPUTO, as set forth in paragraph three(3) of this count, was false and known by him to be false when made.

(Title 18, United States Code, Section 1623)

COUNT THREE

- lae allegations contained in paragraph one (1) of Count One herein are repeated and realleged as though fully set forth herein.
- 2. It was a matter material to said Grand Jury investigation to determine whether or not JOHN CAPUTO requested Joseph Schiaffino to call Sergeant Rugene Statile of the First Precinct, New York City Police Department, in April of 1971.
- 3. On the 29th day of April, 1974, JOHN CAPUTO, while under oath, did know ugly declare before said Grand Jury with respect to the aforesaid material matter, as follows:
 - Q. After your arrest, which was in April of 1971, I believe?
 - A. Yes.
- Q. Did you go down to the Paris Bar and ask Joe Schiaffino to call Sergeant Gene Statile for you?
 - A. I never asked him to call nobody for me.
 - Q. You are positive of that?

- A. That's right.
- Q. Because you didn't know Gene Statile at that time?
- A. Not only didn't I know him. I never told this guy to call anybody for me. If I ever went down there, it would be hello, nice talk, like that.
- 4. The aforesaid declaration by JOHN CAPUTO, as set forth in paragraph three (3) of this count, was false and known by him to be false when made.

(Title 13, United States Code, Section 1623)

COUNT YOUR

- 1. The allegations contained in paragraph one (1) of Count One herein are repeated and realleged as though fully set forth herein.
- 2. It was a matter material to said Grand Jury investigation to determine whether or not JOHN CAPUTO had a conversation with Joseph Schiaffino in the summer of 1973 during which conversation JOHN CAPUTO questioned Joseph Schiaffino about his testimony before this Grand Jury.
- 3. On the 29th day of April, 1974, JOHN CAPUTO, while under oath, did knowingly declare before said Grand Jury with respect to the aforesaid material matter, as follows:
- Q. Let me quote from some grand jury testimony that was given here on November 21, 1973 and I'm asking you to comment.
 - A. Yes.
- Q. This is the grand jury appearance of Joseph Schiafrino and the testimony I'm reading appears on page 52 of the transcript and he's talking about a conversation that you had with him the previous summer.

Question by Mr. Shanley:

"QUESTION: When did he come around to see you?"
He, meaning you.

"ANSWER: After I appeared over here with Mr. Dillon.

He had knowledge that I appeared before the grand jury,
how, I don't know."

And there's some following comments.

"QUESTION: Where did this take place?

"ANSWER: Down in the Fulton Fish Market.

-5-

"QUESTION: In hot weather?

"ANSWER: Yeah, it must have been in the middle of the summer.

"QUESTION: You testified before the grand jury on June 16?

"ANSWER: Yesh.

"QUESTION: Was it after that?

"ANSWER: Yes.

"QUESTION: What did he say to you?

"ANSWER: He asked me if I was over in front of the grand jury.

"QUESTION: What did you say?

"ANSWER: I said I went over there but I didn't test fy.

Subsequently you people told him I did testify.

"QUESTION: I'm asking you what you told him?

"ANSWER: Yeah. I told him I didn't testify.

"QUESTION: What did he say?

"ANSWER: That's all.

"QUESTION: Did he express --

"ANSWER: Yeah. He was happy that I didn't testify."

Did that happen? Did that conversation take place?

A. NO, sir. No.

4. The aforesaid declaration by JOHN CAPUTO, as set forth in paragraph three (3) of this Count, was false and known by him to be false when made.

(Title 18, United States Code, Section 1623)

A TRUE BILL

FOREMAN

and wife

DAVID G. TRAGER UNITED STATES ATTORNEY

Attorney for _____

Attorney for _____

To:

RICHARD L. SHANLEY, SPECIAL ATTORNEY X4022

Attorney for _____



Address Roply to the Division Indicated and Refer to Initials and Number

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Organized Crime Section Criminal Division Federal Builling 35 Tillary Street Room 327-A Brooklyn, New York 11201 February 13, 1975

The Honorable Judges of the United States District Court for the Eastern District of New York

RE: Immunity: Joseph Schiaffino

Dear Sirs:

This letter is submitted in support of an application for an order, pursuant to Title 18, United States Code, Sections 6002 and 6003, requiring the above-named individual to give testimony or provide other information.

In my judgment the testimony or other information sought is necessary to the public interest. It is likely that the above-named individual will refuse to testify on the basis of his privilege against self-incrimination.

Respectfully.

David G. Trager

United States Attorney Eastern District of New York DATERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

APPLICATION

JOHN CAPUTO

- 1. That the trial of this case concerns violations of Title 18
 United States Code, Sections 1623
- 2. That the witness JOSEPH SCHIAFFINO has been subpressed to appear at this trial on February 24, 1975, as a material witness.
- 3. That the witness JOSEPH SCHIAFFINO is expected to invoke modelines of the Fifth Amendment as a ground for refusing to answer the questions posed to him by the Government.
- 4. That it is necessary to the public interest that the witness be required to answer questions directed to him during the said trial.
- 5. That this application is made with the approval of the Assistant Attorney General for the Criminal Division of the United States Department of Justice (annexed and incorporated herein as Exhibit C.)

Respectfully Submitted,

DAVID G. TRAGER United States Attorney

Richard L. Shanley Special Attorney Organized Crime Section

Department of Justice

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

AFFIDAVIT

JOHN CAPUTO

STATE OF NEW YORK) SS:

RICHARD L. SHAMLEY,

being duly sworn, says:

- 1. That he is a Special Attorney for the Department of Justice, and that he has been directed by the Attorney General to try or assist in the trial of the above case now pending in the United States District Court for the Eastern District of New York.
- 2. That the trial of this case concerns violations of Title 18 United States Code, Section 1623 booksesse.
- 3. That the testimony of JOGEPH SCHIAFFINO is necessary to the public interest.
- 4. That the testimony sought is material and necessary to the prosecution of
 - 5. That the application of your affiant in this matter is made in good faith.
- 6. JOSEPH SCHIAFFINO has not yet appeared in the trial of this case, but, based on information and belief, the affiant and other governmental agents anticipate that he will invoke his Fifth Amendment privilege when he appears at trial.

Richard L. Shanley Special Attorney
Organized Crime Section
Department of Justice

Sworn to before me this
20 - day of February, 1975

JAMES O, URUSER NOTAGE FOR THE COUNTY OF THE PROPERTY OF T

- B -

119 1 : 1075

Mr. David G. Trager United States Attorney Brooklyn, New York

Attention: Mr. Richard L. Shanley

Special Attorney

Brooklyn Strike Force

Re: United States v. Caputo, Criminal Number 74-CR-621

Dear Mr. Trager:

Your request for authority to apply to the United States District Court for the Eastern District of New York for an order or orders requiring Joseph Schiaffino to give testimony or provide other information pursuant to 18 U.S.C. 6002-6003 in the above matter and in any further proceedings to 18 U.S.C. 6002-6003 in the above matter and in any further proceedings resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U.S.C. 6002-6003 and 28 C.F.R. 0.175.

Sincerely,

JOHN C. KEKNEY

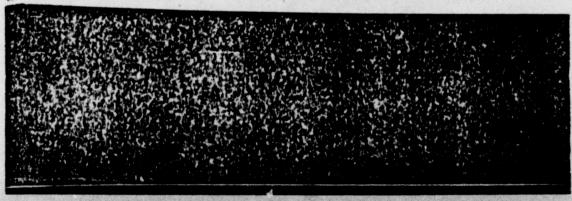
Acting Aggistant Attorney General

15 A

NITED STATES MAGISTRATE

Easten DISTRICT OF New York

Honorable MAX SCHIFF	AN 225 Cadman Plaza B., B'klyn, MY.
Honorable Fund Schare	(Address)
MAGISTRATE'S DOCKET NO. 75 CASE NO.279 THE UNITED STATES VS.	Complaint filed on Peb. 18th 19 75, by Richard L. Shanle Official title S/Atty. US Dept. of Just icharging violation of United States Code, Title 18 , Section 1623 , on Fub. 19 , at in the
	division of the district of Vork
JOSEPH SCHIAFFINO	as follows: Material Witness.
	(Here insert brief summary of facts constituting offense charged)
WARRANTS OR SUMMONS ISSUED:	
Date Feb, 18th, 1975 Warrant	ACHMINISTRY Joseph Schiaffino (Name of definition)
o (name and title of officer) to any	S/Atty or/any US Marshal of EDNY (Name of defendant)
Substance of return	
	2
	/Summons for
(name and title of officer) Substance of return	
Substance of return	
ROCEEDINGS ON FIRST PRESENTATION OF	Accused to Magistrate:
	on warrant of Max Schiffman
Date Feb. 19th, 1975 Arrested	
for United State	Richard Shanley
Appearances	(Name) (Address)
l for accused Ar	thony Crecca, Esq. (Ret) 30 Bay Street, Staten
for accused Al	(Name)
Proceedings taken	(Name) (Address) NY.
Proceedings taken (Here insert with dates.	(Name) (Address) NY.
Proceedings taken (Here insert with dates, DEBNDANT INFORMED OF	(Name) (Address) NY.
Proceedings taken (Here insert with dates, DEBNDANT INFORMED OF If arrest is without warrant: "defendant informed of U.S. MAG. FORM #1 ATT	(Name) (Address) NY. when appropriate, a seriation account of essential steps taken at hearing such as "complaint propared," COMPLAINT AND RIGHT TO RETAIN COUNSEL. complaint and right to retain counsel and preliminary hearing": "preliminary commissions unived."
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EASTERN DISTRICT OF NEW YORK

Working of Just

UNITED STATES OF AMERICA

-V-

JOSEPH SCHIAFFINO

Material Witness

COMPLAINT

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STATE OF NEW YORK SS:

RICHARD L. SHANLEY, being duly sworn, deposes and says:

That he is a Special Attorney, United States Department of
Justice, Organized Grime and Racketeering Section, Brooklyn Strike
Force, and is in charge of the prosecution United States v. John Caputo,
74 CR 601, the trial of which case is scheduled to commence on February 24,
1975, before the Henorable Henry Bramwell, United States District Court,
Eastern District of New York. Based upon information set forth below,
your deponent requests that JOCETH SCHIAFFINO, a prospective witness in
the above-mentioned case, a prosecution for violations of Title 18,
United States Code, Section 1623, be charged as a material witness and be
taken into custody for his appearance in the Eastern District of New York,
in connection with United States v. John Caputo.

The source of your deponent's information and the grounds for his belief are:

- 1. The witness JOSETH SCHIAFFINO testified in a Special Grand Jury in the Eastern District of New York, in the matter of United States v. Joseph Doc. File Number 731,995, regarding an alleged payoff to law enforcement officers to fix a case then pending in the Eastern District of New York, in the Spring of 1971.
- 2. Based upon his testimony, and that of other witnesses, the Grand Jury voted an indictment, 74 CR 621.
- 3. That in mid-January, 1975, your deponent made a telephone call to JOSEFFI SCHIAFFINO at his residence in Staten Island. New York, at which

as his wife, that he was sleeping but that she would give him the message to call me.

- 4. That during that conversation, the female berated your deponent for harassing her husband.
- 5. That approximately one week later, your deponent called the residence of JOSEPH SCHIAFFINO and once again had a conversation with the same female who stated that her husband was sick and that she would give him the message that your deponent called. She once again berated your deponent for harassing her husband.
- 6. That on January 21, 1975, your deponent caused a trial subposma to be issued against JOSEPH SCHIAFFINO, returnable February 24, 1975, the date of the commencement of the trial <u>United States v. John Caputo</u>, and turned said subposma over to the United States Marshal for service.
- 7. That your deponent was informed by Deputy Marshal William P. Saliski that he went to the residence of JOSEPH SCHIAFFINO at 45 Esther Depugh Street, Staten Island, New York, at 9:00 PM, January 22, 1975, rang the bell, and identified himself and the purpose of his visit, to a woman who identified herself as Mrs. SCHIAFFINO.
- 8. That your deponent was further informed by Deputy Marshal Saliski that the aforesaid woman, through a window adjacent to the door, informed him that her husband was sick in bed and could not be disturbed.
- 9. That your deponent was advised by Deputy Marshal Salishi that he returned the the residence of JOSEPH SCHIAFFINO on January 29, 1975, at 9:30 PM, and once again after making this identity and purpose known was informed by the eforesaid female from a window that her husband was in bed with a bad back and was refused admittance to the house.
- 10. That your deponent gave the aforesaid subpoens to Special Agent James T. Mulroy with the Federal Bureau of Investigation, early in February, 1975, for service by Agents of that Bureau.
 - 11. That your deponent was informed by Roger Maxwell, Special Agent

of the Federal Bureau of Investigation, that upon instruction from Special Agent James T. Mulroy, he and a fellow agent went to the residence of JOSEPH SCHIAFFINO on February 11, 1974, in order to serve the aforesaid subposena upon JOSEPH SCHIAFFINO.

- 12. That your deponent was informed by Special Agent Maxwell that the doorbell was rung and the door knocked upon with no answer and that he began to depart the area.
- 13. That your deponent was further informed by Special Agent Maxwell that he heard a noise in the house, returned and knocked on the door.
- 14. That your deponent was advised by Special Agent Maxwell that a woman identifying herself as Mrs. SCHIAFFINO spoke to him through a window at the side of the house, after he and his fellow agent had identified themselves and asked to speak to JOSEPH SCHIAFFINO.
- 15. That Special Agent Maxwell stated to your deponent that he was advised by the aforesaid woman that her husband was not at home but to call later in the day, at which point, Special Agent Maxwell and his fellow agent left the premises.
- that on the evening of February 11. 1975, he telephoned JOSEPH SCHIAFFINO, identified himself, and stated that he wanted to interview JOSEPH SCHIAFFINO personally. That, JOSEPH SCHIAFFINO informed him that he had been on the New York City Police Force for 22 years, knew his rights, and did not have to talk to anyone if he did not want to, and ended the conversation.
- 17. That your deponent was informed by Special Agent Charles Domroe that after he had been instructed by his superiors to effect service of the aforesaid subpoena, he, in the company of a fellow agent, went to the residence of JOSEPH SCHIAFFINO at approximately 11:00 AM, February 14, 1975, knocked on the door and identified himself and his fellow agent and the purpose of their visit, namely to serve a subpoena on JOSEPH SCHIAFFINO, to a woman identifying herself as JOSEPH SCHIAFFINO's wife who appeared at a window near the front door.

the cases of the days to be because the

- Domroe that he showed the aforesaid woman the subposes and talk her that it called for the appearance by JOHEPH SCHIAFFINO in Federal Court, Eastern District of New York, on February 24, 1977
- Domroe that the aforesaid woman acknowledged that she understood the subpoena and stated that her husband was not at home and that she did not know his whereabouts,
- 20. That your deponent was advised by Special Agent Dource that he informed the aforesaid woman that your deponent was handling the case, and that she should tell her husband to contact your deponent, and that a warrant for his arrest might issue if he swoided service of the subpoens, and thereupon Special Agent Dource and his fallow agent left the premises.
- 21. That your deponent telephoned JOSEPH SCHIAFFINO's residence at approximately 11:00 AM, February 19, 1975, and engaged in conversation, with a woman identifying herself as Mrs. SCHIAFFINO.
- 22. That Mrs. SCHIAFFINO stated that she did not know of the whereabouts of her husband and would not state the last time she had been in communication with him.
- 23. That your deponent advised the aforesaid women that he had a subpoena for service on JOSEPH SCHIAFFINO and that it would be in his best interest if he contacted your deponent immediately and submit to service so that the issuance of a material witness warrant would be commencing, to which the aforesaid women did not reply either affirmatively or negatively.
- 24. That approximately twenty minutes after the aforementioned phone conversation, your deponent received a phone call from JOSEPH SCHIAFFINO.

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25. That your deponent told JOSEPH SCHIAFFINO that he was to be a witness in the forthcoming trial and that your deponent was desirous of effecting service on JOSEPH SCHIAFFINO.

- 26. That your deponent further advised JOSEPH SCHIAFFINO that a warrant would issue should be continue to evade service, and to inform your deponent where service could be effected.
- 27. That JOSEPH SCHIAFFINO stated to your deponent that he would not disclose his whereabouts and that he might disappear for a long period of time.
- 28. That JOSEPH SCHIAFFINO further informed your deponent that he was going to retain an attorney and that at that time he would consider coming to your deponent's office.

WHEREFORE, your deponent respectfully requests that the above named material witness JOSEPH SCHIAFFINO be taken into custody and dealt with according to law.

Richard L. Shanley, Special Attorn United States Department of Justic

Sworn to before me this 19th day of February, 1975

usingment

United States Bistrict Court

FOR THE

EASTERN	DISTRICT	OF NEW	YORK
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Magistrate's Docket No. 75.12.19

Case No.751,247

UNITED STATES OF AMERICA

JOSEPH SCHLAFFINO

Material Witness

WARRANT OF ARREST

To Any Agent of the Federal Bureau of Investigation

You are hereby commanded to arrest

JOSEPH SCHIAFFINO

, and bring him

forthwith before the nearest available United States Magistrate to answer to a complaint charging him

with as a material witness in the case of United States -v- John Caputo, 74 CR 621.

in violation of U.S.C. Title, , Section

Date February 19

. 1975 .

Here insert designation of officer to whom warrant is issued.

Was fulful States Magistrate.

BETURN

Received

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Rv

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EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

U. S. DISTRICT COURT E.D. N.Y

ORDER

M' BILLED

FEB 2 0 1975

JOHN CAPUTO

An application having been made to this Court by the United States Attorney (see application and affidavit annexed and marked "A" and "B" respectively) pursuant John C. Kenny to his authorization by KROCK COURTH ASSISTANT Attorney General for the Criminal Division of the United States Department of Justice (see copy of letter annexed and marked "C"), wherein the affiant has represented that in his judgement the testimony of JOSEFH SCHIAFFINO in the trial of this case in the Eastern District of New York, is necessary to the public interest. Pursuant to Title 18, United States Code, Sections 6002, 6003, it is hereby

ORDERED that JOSEPH SCHIAFFINO answer all questions directed to him during the aforesaid trial in the Eastern District of New York. It is further

ORDERED that JOSEPH SCHIAFFINO shall not be excused from testifying or producing books, papers, or other evidence on the ground that testimony or evidence required of him may tend to incriminate him or subject him to a penalty of forfeiture.

It is further

ORDERED that no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against JOSEPH SCHIAFFINO in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

UNITED STATES DISTRICT JUDGE EASTERN DISTRICT OF NEW YORK

Dated: Brooklyn, New York February (1975

1	UNITED STATES DISTRICT COURT
2	EASTERN DISTRICT OF NEW YORK
3	х
4	UNITED STATES OF AMERICA :
5	-against- : 74 CR 621
6	JOHN CAPUTO, :
7	Defendant. :
8	x
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10	United States Courthouse
11	Brooklyn, New York
12	February 24, 1975 10:00 a.m.
13	
14	Before:
15	HONORABLE HENRY J. BRAMWELL, U.S.D.J.
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22	ILENE GINSBERG
23	ACTING OFFICIAL COURT REPORTER
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wait around until I could come in. 1 THE COURT: What do you suggest? MR. GALLINA: I think I should take care of that 3 matter. There are so many other attorneys involved. 4 THE COURT: All right. We can start tomorrow 5 morning. 6 10 o'clock? 7 MR. GALLINA: Yes. 8 MR. SHANLEY: If I may be heard. 9 After the evidentiary hearing we will be 10 prepared to go forward to trial? 11 THE COURT: Oh, yes. It is on for trial. 12 I understand we have a material witness here. 13 MR. SHANLEY: I would ask your Honor to ask him 14 to return to the courtroom tomorrow at 10 o'clock. 15 (Whereupon, Joseph Schiaffino and his attorney, 16 Dennis Peterson approach the bench.) 17 MR. PETERSON: Dennis Peterson for Schiaffino, 18 30 Bay Street, Staten Island, New York. Your Honor, this gentleman is scheduled to 20 testify as a result of being declared a material witness. 21 However, in light of the proceedings today and 22 since a jury will probably be empaneled tomorrow, could 23 we be subject to a telephone conversation? 24

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He is a married man, a hard worker. He has

already lost time from his labors and if called upon to testify I am sure it would be for three, four or five days, assuming the trial does in fact commence tomorrow.

MR. SHANLEY: I have no objection if counsel will state for the record that a telephone call will produce his client within an hour or so.

MR. PETERSON: I would say a phone call would produce the client but it takes an hour to get from Staten Island to here.

MR. SHANLEY: Two hours.

THE COURT: I think that would be better and how will Mr. Schiaffino be available? Tell us exactly.

MR. PETERSON: A phone call to my office and we would be able to contact him.

THE COURT: You will give us the name, address and telephone number?

MR. PETERSON: Absolutely.

448-8032, Dennis Peterson, 30 Bay Street, Staten Island, New York.

THE COURT: Do you have it, Mr. Shanley?

MR. SHANLEY: 443-8032, Dennis Peterson, 30 Bay

Street, Staten Island, New York.

MR. PETERSON: Yes.

MR. SHANLEY: And I will contact you there.

MR. PETERSON: Right.

THE COURT: Mr. Joseph Schiaffino, you are still a material witness and subject to the orders of this Court.

At your attorney's request you are subject to be available to the United States Attorney as a result of a phone call.

Do you have any questions?

MR. SCHIAFFINO: No.

THE COURT: You will make yourself available?

MR. SCHIAFFINO: Yes.

THE COURT: Any questions?

MR. SCHIAFFANO: No, sir.

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EXCERPTS FROM MINUTES OF NOVEMBER 5, 1975

	THE TENOTES OF NOVEMBER 3, 1975
° 2	UNITED STATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK
4	х
5	UNITED STATES OF AMERICA, :
6	-against- : 74-CR-62
7	JOHN CAPUTO, :
8	Defendant. :
9	х
10	
11	United States Courthouse
12	Brooklyn, New York
13	November 5, 1975 10:30 o'clock A.M.
14	
15	Before:
16	HONORABLE HENRY BRAMWELL, U.S.D.J.
17	and a Jury
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22	GENE RUDOLPH
23	OFFICIAL COURT REPORTER
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THE COURT: You have no knowledge?

MR. SHANLEY: No.

There are interviews which were turned over to me of IRS with Mr. Schiaffino.

THE COURT: Those are in there?

MR. SHANLEY: Yes.

Everything that was ---

THE COURT: It is there. I can't expect more.

MR. SHANLEY: I would like to -- before we start, your Honor, Mr. -- I have -- just come to my attention that Mr. Schiaffino has left his house and he has not contacted his wife and his lawyer called me a little while ago and said he's been unable to reach Mr. Schiaffino.

So I asked Mr. Peterson to come over here and tell your Honor what the situation is with Mr. Schiaffino and if in fact Mr. Schiaffino is -has left his house and is now apparently seeking once again) to avoid testifying, I ask your Honor to issue a bench warrant and revoke his bail. Revoke his bond.

THE COURT: I can do that.

Is he on bond now?

MR. SHANLEY: I think he's on a personal recognizance. If it's just a -- really doesn't mean much but --

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THE COURT: As to this case?

MR. SHANLEY: Yes, your Honor. He's a material witness in this case.

THE COURT: And there is a personal recognizance bond?

MR. SHANLEY: The best of my understanding, your Honor gave him a personal recognizance bond, yes.

MR. GALLINA: I don't recall, your Honor.

MR. SHANLEY: His lawyer was present with him at the time.

THE COURT: His lawyer is here?

MR. SHANLEY: I left instructions with his secretary to get him here as fast as possible, so that he could explain, you know, what communications he received from Mr. Schiaffino.

MR. GALLINA: Was a subpoena served on him? MR. SHANLEY: Mr. Schiaffino, to refresh your Honor's recollection, was arrested as a material witness and at that time the direction to his attorney was that he would produce him on three hours notice and Mr. Schiaffino, as I recall, was personally agreeable to that and that's the way it stood.

When the trial was adjourned two weeks ago,

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that morning, which was two weeks ago Monday, was October 21, I think, your Honor, Mr. Peterson was here. I told Mr. Peterson that the trial had been adjourned for two weeks and to inform his client.

I also sent Mr. Peterson a letter in the normal course of business. I then -- there were numerous telephone calls made when the trial was temporarily delayed on Monday, that -- the effect that Mr. Schiaffino would be here at noon today.

I don't know anything more. I do know that Mr. Gallina's office on Monday at 12:10 called me and said that Mr. Schiaffino wanted to know when he was supposed to appear.

MR. GALLINA: Mr. --

MR. SHANLEY: Mr. Gallina's office.

MR. GALLINA: My office?

MR. SHANLEY: Yes. Your secretary called.

MR. GALLINA: My secretary would never have said that. Would have asked -- concerning Mr. Stabile maybe but not Mr. Schiaffino.

MR. SHANLEY: No.

MR. GALLINA: We don't represent Mr. Schiaffino I think you're in error. I'm sure that none of my secreatries even know the name of Mr. Schiaffino.

They have never heard of Mr. Schiaffino before.

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10		MR.	SHANLEY:	All	I	know	is	what	was	reported
	to n	ė by m	y secretar	y.						

THE COURT: So you want to wait until Mr. Peterson comes?

MR. SHANLEY: I'm pointing out that Mr.
Schiaffino has knowledge, knew that this trial was /
imminently scheduled for trial.

THE COURT: Do you want to wait until Mr. Paterson comes?

MR. SHANLEY: I don't know when -- I have no idea where he is, your Honor. His secretary said she would try and get in touch with him to come over.

THE COURT: Because you want a bail -- a bench warrant ordered?

MR. SHANLEY: Yes, your Honor, if the circumstances — if it's — if your Honor feels that the circumstances, as Mr. Peterson presents it to you, indicates that Mr. Schiaffino is — is attempting to avoid testifying —

THE COURT: We are going to have Mr. Peterson here to testify to this?

MR. SHANLEY: Yes.

THE COURT: I can do it anytime today you wish, that he comes in.

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Mr. Gallina?

MR. GALLINA: Yes, your Honor, I would think so. We're not going to open.

THE COURT: Yes. All right.

Bring the jury in.

MR. SHANLEY: four Honor, before we start, will the -- will you have the Clerk mark that as Court Exhibit No. 1, saubmitted in camera.

THE COURT: Mark this as a Court Exhibit. It is sealed.

> MR. SHANLEY: It is sealed, yes, your Honor. Thank you.

THE COURT: Mark it as a Court Exhibit.

THE CLERK: One sealed envelope and contents marked Court's Exhibit No. 1.

(so marked.)

THE COURT: All right, bring in the jury.

What time do you want to start tomorrow?

MR. GALLINA: Any time your Honor desires.

Ten o'clock, your Honor?

THE COURT: Ten o'clock.

(Jury present.)

THE COURT: Ladies and gentlemen of the jury, it looks as if we will not be able to start the case

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This comes about from certain related material which must be examined, on which the Court must make a ruling prior to the opening of the case.

Under these circumstances -- well, what I am also going to do, this afternoon I have a hearing which I've put off a couple of times.

It will take most of the afternoon and for that reason we are putting this matter over to tomorrow, so tomorrow I would like to start at 9:30. 9:30 on this case.

at 9:30. You may leave for the day. You may sign in tomorrow morning before you come up to the jury assembly room so the jurors may leave for the day.

9:30 tomorrow morning. Thank you.

(The following occurred in the absence of the jury.)

MR. SHANLEY: four Honor, when Mr. Peterson arrives, I'll contact your chambers immediately.

THE COURT: When Mr. Peterson arrives, you can contact chambers and do you think he'll be here or do you want to see?

MR. SHANLEY: All I was able --

THE COURT: Would you want to be here?

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MR. GALLINA: I have really no need to be, your Honor.

THE COURT: That; s up to you. If you want to be, you are privileged to be here.

Other than that, the Court will take care of it with Mr. Shanley, whatever it may be.

MR. GALLINA: Thank you.

MR. SHANLEY: Your Honor, it presents a problem because if Mr. Schiaffino is now a fugitive I'd ask for a few days and -- to find him.

MR. GALLINA: I would object, your Honor. /

THE COURT: Well, I don't know if we can work this out. I'm not going to make a ruling on it until that becomes apparent, but I don't know at this time that I -- you know, you want a continuance, you mean?

MR. SHANLEY: Your Honor, if Mr. Schiaffino isn't available to testify, and he is perhaps the most important witness on Counts 3 and 4 --

THE COURT: Counts 3 and 4?

MR. SHANLEY: Right, your donor.

THE COURT: What you will do, you will go forward with whatever proof you have and when you get to that point where you are on Counts 3 and 4 and he is unavailable, then you'll make whatever

MR. GALLINA: In view of the prosecutions statement, where I was going to absent myself from any proceedings having to do with the witness Schiaffino, in view of the mistaken impression of the prosecutor that my office called his office and his secretary told him that my office made some statement about Mr. Schiaffino, I want that clarified at this point.

I know none of my secretaries even knew the name of Mr. Schiaffino. But Monday, our office was notified to have Mr. Stabile in court on Wednesday.

MR. SHANLEY: Stabile?

MR. GALLINA: Mr. Stabile.

THE COURT: Satile?

MR. GALLINA: No. I mean Mr. Statile. I'm getting these names mixed up.

Gene Statile, whom our office represents before Mr. Nadjari's office and we called back to say that we would have him there.

They probably called the wrong office, because we had originally represented Mr. Statile here also.

MR. SHANLEY: It could well have been a

misunderstanding on my part. I'm not saying -- I'm not saying I want to establish that maybe Mr.

Schiaffino knew what --

THE COURT: As far as Schiaffino is concerned, the case will go forward and when you get to a point where you require some time of some nature, you make an application accordingly.

MR. GALLINA: Your Honor, if that -- in anticipation of that application --

THE COURT: We can't anticipate it because when it comes up, then we'll rule on it.

Why anticipate something of that nature?

MR. GALLINA: That's true. It is pretty evident that the Government did not serve a subpoena
then on Mr. Schiaffino and I'd hate --

MR. SHANLEY: He's a material witness. He's under arrest.

THE COURT: Mr. Gallina, I don't care what they did or didn't do. The case is just going to go forward.

MR. GALLINA: Good. That's what I want.

THE COURT: I don't care what they did or didn't do.

All right.

MR. GALLINA: Thank you, your Honor.

MR. SHANLEY: Good d', your Honor.

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(At 12:40 p.m. the following occurred in the courtroom without the presence of the jury.)

THE COURT: Give your name to the reporter.

MR. PETERSON: Dennis Peterson, 30 Bay Street,
STaten Island, New York, here on behalf of Joseph
Schiaffino, material witness.

Judge, here is the situation to date:

The matter was last scheduled for Mr. Schiaffino to be in this court I believe at 2:00 p.m. on November 3rd. On the morning of November 3rd I received a phone call -- my office received a phone call from an investigator, Malroy I believe his name was. My office called up Mr. Schiaffino's residence and said, Don't be here on November 3rd.

Last evening I called the Schiaffino residence and spoke to a young voice who more than likely is the son of Mr. Schiaffino and asked for Mr. Schiaffino.

The voice told me he was not in.

At that time I left a message with

Mr. Schiaffino's son -- I am quite certain it was

his son -- to be in the Criminal Court this day at

9:15. As of quarter to 9:00 this morning I was to

meet Mr. Schiaffino.

At 9:15, at approximately 9:15, my office

received a phone call that Mr. Schiaffino was hunting.

At that time I got involved in a hearing in the

Criminal Court. On trying to contact Mr. Schiaffino's residence, the line was busy and I was advised by

my office to come over here to speak to your Honor.

This is how it sits, Judge.

THE COURT: I see.

Yes?

MR. SHANLEY: Well, your Honor, Mr. Peterson is accurate. However, on Monday, Special Agent James
Malroy made an initial report to Mr. Peterson's office in which he said, Don't come over this morning.
Upon my direction, shortly after that, he made a second call to Mr. Peterson's office telling his office to relay the message to Mr. Peterson that
Mr. Schiaffino should be over here at 11:00 o'clock this morning.

Now I don't know whether that was ever passed -THE COURT: He is not here.

Have you issued a subpoena?

MR. SHANLEY: Your Honor, he is under -- a subpoena was initially issued for him, a trial subpoena.

THE COURT: When was that issued?

MR. SHANLEY: The Eastern District of New York

We were unable to serve him. A material witness warrant was issued by this Court on -- I'm sorry, I don't know whether by this Court or by Magistrate Cattoggio on February 19, 1975.

He ultimately turned himself in to the Department of Justice on 2/20/75.

At that point in time he was arraigned and released on his own recogrizance. He had been instructed to be here at your courtroom at 10:00 o'clock on the 24th of February, 1975. On the 24th of February, 1975, the witness appeared and was told by your Honor that he could leave, and his attorney, Dennis Peterson, stated that he could make the witness available on, I think it was, either two or three hours notice.

Since that time and in the number of adjournments that we have had I've always written Mr. Peterson and informed him of when the new trial was scheduled for the new time and the time for his witness to appear.

So on the facts here, your Honor, I would ask that a warrant be issued for Mr. Schiaffino, and as I say, he is on ROR, on his own recognizance, so there is not much the Court can do with penalizing

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Mr. Schiaffino for jumping bail, if that is what it would be called.

So the Government has fulfilled its responsibilities all the way down the line.

THE COURT: When was bail set?

MR. SHANLEY: He was released on his own recognizance.

THE COURT: When was that done?

MR. PETERSON: Judge, I don't know, offhand I know it was about five, six, seven months ago.

MR. SHANLEY: It was on the 20th of February, 1975.

THE COURT: Do you have anything to say as to this, Mr. Peterson?

MR. PETERSON: Yes, Judge.

Mr. Shanley indeed has always informed my office as to when Mr. Schiaffino must be in Court.

On every prior occasion Mr. Schiaffino was available to be in this Court.

It seems to me, Judge, that if there is fault at all, it might very well be mine in this respect:

On Monday, indeed, Mr. Shanley notified my office that it was adjourned from 2:00 p.m. Tuesday until 10:00 o'clock this morning.

Now, there have been prior adjournments, the

your Honor.

As soon as he is heard from b y phone, and I will call as soon as I can, or as soon as he is back from hunting, he will come in immediately. He might be back this afternoon, I don't know.

I don't even know if he is hunting for a day or two, and I have not yet had the time to communicate with his family.

THE COURT: Well, we are actually on trial with the case and we would need him in, you see.

MR. PETERSON: Yes, I am aware.

THE COURT: It may very well be even if a bench warrant were ordered that he could be told about it and he would come in.

MR. PETERSON: I am sure, Judge, just on a verbal telling he would come in.

THE COURT: He would come in?

MR. PETERSON: Yes, if I can tell him.

THE COURT: I will order the bench warrant for the material witness Schiaffino and if he can come in on a phone call, I don't see anything wrong with that, and when he gets here we will see just why he didn't come in and why he didn't show up on this occasion.

MR. PETERSON: Fine, Judge.

1	THE COURT: All right.
2	MR. PETERSON: Okay.
3	THE COURT: All right, bench warrant ordered.
4	MR. SHANLEY: Thank you.
5	MR. PETERSON: Thank you, Judge.
6	MR. SHANLEY: Now, your Honor, we do intend to
7	put Mr. Schiaffino on the stand tomorrow, I would
8	like the Court to be aware of that.
9	MR. PETERSON: As scon as I contact Schiaffino
10	or he contacts me I will contact Mr. Shanley.
11	THE COURT: Once he gets here you can put him
12	on as you see fit.
13	MR. SHANLEY: Thank you, your Honor.
14	THE COURT: All right, tomorrow on this case.
15	MR. SHANLEY: Thank you.
16	MR. GALLINA: Thank you.
17	THE COURT: Thank you.
18	Let the record indicate that Mr. Gallina, the
19	attorney for the defendant, was present during the
20	application made before the Court.
21	MR. GALLINA: Thank you, your Honor.
22	THE COURT: Thank you.
23	MR. SHANLEY: Thank you, your Honor.
24	(At this point a recess was taken until
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u can put him nor. on this case. Gallina, the t during the nor. onor. en until Thursday, November 6, 1975.)

ARREST WARRANT FOR JOSEPH SCHIAFFINO (NOVEMBER 5,

Warrant for Arrest of Defen (Rev. 7-52)

45

United States District Court

FASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

TIME A.M..... P.M.....

v. JOHN CAPUTO

74 CR 621 No.

To1 Any Agent of the Federal Bureau of Investigation

You are hereby commanded to arrest Joseph Schiaffino

and bring h im

forthwith before the United States District Court for the Eastern

District of New York

in the city of Brooklyn

subpoena to answer to an

charging him

flight to avoid giving testimony in United States v. John Caputo, 74 CR 621 on November 5, 1975, in which case he is a material witness, having been arraigned and released on his own recognizance on February 20, 1975.

Title 18, United States Code, Section 1973; Title 18, United States Code, Section 3150. in violation of

LEWIS ORGEL

Dated at ___ Brooklyn. New York

on ___ November 5

Deputy Clerk.

RETURN

Eaulern

Bail fixed at \$

District of

Received the within warrant the

2 day of Nove

19 25 and executed same.

' Insert designation of officer to whom the warrant is issued, e. g., "any United States Marshal or any other · authorized officer"; or "United States Marshal for District of "; or "any United States Marshal"; or "any Special Agent of the Federal Buteau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Burcau of investigation"; or "any agent of the Alcohol Tax Unit."

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Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: RICHARD L. SHANLEY, ESQ. Special Assistant Attorney

GINO GALLINA, ESQ. Attorney for Defendant

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(The following occurred in the absence of the jury.)

THE COURT: Good morning.

MR. SHANLEY: Good morning, your Honor.

MR. GALLINA: Good morning.

THE COURT: The Court has examined Court Exhibit 1 in camera and has gone over all of the papers which the Government has submitted to the Court.

After an examination of these papers, the application of the defendant's attorney is denied, and the Court does not feel that any of these papers may be used by the defendant's attorney for the purpose of examining into the allegations which are before the Court in this case.

The application is denied.

I might say, Mr. Shanley, in connection with the Government's case and on the issue of materiality, I am sure you are aware that the Government must prove materiality as part of its direct case.

MR. SHANLEY: Oh, yes, your Honor.

THE COURT: You are aware of this.

MR. SHANLEY: Your Honor --

THE COURT: And the authorities for it are set

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forth in that memorandum of August 7th.

MR. SHANLEY: Yes, your Honor.

Your Honor, I submitted a second envelope yesterday afternoon.

THE COURT: Yes. I have looked through that one, too.

MR. GALLINA: I understand there are more materials.

MR. SHANLEY: Yes. I would like to make -- the Bureau brought down some material this morning, which I haven't seen before. They are basically intercommunications between the Bureau and Washington.

However, they do fall within your Honor's ruling and I am having them Xeroxed and I am going to present them to the Court for in-camera inspection as soon as they get Xeroxed.

THE COURT: All right.

MR. SHANLEY: I have one other point, your

Honor. I'd like to make the record very clear that

the Government — many of these documents or statements

made by these various agents and witnesses in this case,

which I showed you yesterday, I presented to the Court,

that the Government should — let's say, Agent Malone

takes the stand. The Government would turn — would

THE COURT: That would be required.

MR. SHANLEY: As 3500 material.

The Government's position as to 3500, the defendant would get statements which are testified to on the substance of which are testified to on direct examination.

THE COURT: That the Government would be required to do.

MR. SHANLEY: Yes, your Honor.

And with regard to -- I think Mr. Gallina has indicated that Mr. Moresco and Mr. Villano were in some sort of a conspiracy or plot to -- maybe I'm using the word incorrectly -- should Mr. Moresco be called by the defendant and the defendant is surprised by his answers, doesn't expect him to, you know -- I have no hesitation, your Honor, to turn over statements of Mr. Moresco, Agent Moresco at that time.

I am not trying to hide anything.

THE COURT: That would be required. That would be required.

Mr. Gailina, anything further?

MR. GALLINA: Yes. I understand that the second envelope will be marked as Court Exhibit 2, yo

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THE COURT: Mark this second envelope as Court Exhibit 2.

THE COURT: I will mark that right now.

MR. GALLINA: Thank you, your Honor.

MR. GALLINA: Thank you. And the third group --

THE COURT: It did not get here yet.

MR. GALLINA: When it reaches, we will have it

THE COURT: Surely.

marked as Court Exhibit 3?

MR. GALLINA: Thank you.

THE COURT: Are we ready to proceed?

MR. GALLINA: I am ready.

THE COURT: All right.

MR. SHANLEY: Your Honor, Mr. Schiaffino apparently has not been located yet.

THE COURT: We are going to proceed and we will get to that when you want to get to it. That is up to you.

Bring in the jury.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen. I will give you a few preliminary instructions regarding the case.

The case will proceed in the following order:
The Government will make an opening statement outlining its case. The defendant may make an opening statement outlining his case. He is not required to do so.
The Government is required to make an opening statement.

The opening statements are not evidence but are merely to aid you in generally understanding the nature of the case and the significance of evidence when it is introduced.

After the opening statements, the Government will introduce evidence.

At the conclusion of the Government's evidence, the defendant has the right to introduce evidence.

However, he need not do so.

Rebuttal evidence may be introduced.

At the conclusion of all the evidence, the attorneys may make their closing arguments to you.

Faithful performance by you of your duties is vital to the administration of justice.

The law applicable to this case will be contained in the instructions I give you during the course of the trial and it is your duty to follow all such instructions. It is your duty to determine the facts and to determine them from the evidence and

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the reasonable inferences arising from such evidence, and in so doing you must not indulge in guesswork or speculation.

The evidence which you are to consider consists of the testimony of witnesses and the exhibits admitted in evidence.

The term "witness" means anyone who testifies in person or by deposition, including the defendant.

The admission of evidence in court is governed by rules of law. From time to time it may be the duty of the attorneys to make objections, and my duty as judge to rule on those objections, and whether you can consider certain evidence.

You must not concern yourself with the objections or the Court's reasons for these rulings. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken.

Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against

the Government or the defendant in this case, for each is entitled to the same fair and impartial consideration.

No statement or ruling or remark which I may make during the presentation of testimony is intended to indicate my opinion as to what the facts are. You are to determine the facts.

In this determination, you alone must decide upon the believability of the evidence and its weight and value.

In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to the Government or the defendant, the inclination of a witness to speak truthfully or not, the probability or improbability of the witness' statements, and all other facts and circumstances in evidence.

Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive.

Until this case is submitted to you for your deliberation, you must not discuss this case with anyone or remain within hearing of anyone discussing

it. Neither should you read any newspaper article, listen to any radio broadcast, nor view any television program which discusses the case.

After this case has been submitted to you, you must discuss this case only in the jury room, when all members of the jury are present.

You are to keep an open mind and you must not decide any issue in this case until the case is submitted to you for your deliberation, under the instructions of the Court.

We will now have the opening statement of the prosecutor.

MR. SHANLEY: May we approach the bench for one minute, your Honor?

THE COURT: Surely.

(Side bar follows:)

MR. SHANLEY: I apologize, your Honor; in my haste to get up here, I forgot my notes for my opening statement.

I'd like two or three minutes to go get them and come back.

THE COURT: Do you want me to send the jury out?

MR. SHANLEY: It will only take me a couple of
minutes to get them.

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THE COURT: Surely.

(In open court:)

THE COURT: The prosecutor wants to get some

notes, so we will wait for him.

(Mr. Shanley leaves courtroom.)

(continued next page)

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(Mr. Shanley now present in courtroom.) THE COURT: You may proceed, if you wish, Mr. Shanley.

MR. SHANLEY: Thank you, your Honor.

four Honor, Mr. Gallina, Mr. Caputo, Mr. Foreman, ladies and gentlemen of the jury:

First, I'd like to apologize for delaying you for the last few minutes.

My name is Richard L. Shanley and I am the prosecutor in this particular case against John Caputo.

And my function row i an opening statement, is to give you sort of a road map, a guideline of what the Government expects to prove during the course of the trial. It is merely what the Government expects to prove.

What I say doesn't count. But in order to facilitate you following the evidence, I will outline what the Government witnesses will say.

Now, as the Court pointed out, the defendant is charged with a crime, Federal -- violation of a Federal statute, namely, false declaration before a Grand Jury.

As the Court pointed out to you, this is only a charge. It is up to the Covernment now to prove

beyond a reasonable doubt the defendant did things alleged in the indictment.

four purpose here, ladies and gentlemen, is to make that determination from the credible evidence. The evidence will be from the mouths of witnesses who take the oath and testify.

As the Court pointed out, observe these witnesses. Observe their demeanor, in order to assess their credibility. And in weighing the evidence, use your God-given common sense.

Now, although the Court read the indictment to you on Monday, I'm going to reread it, perhaps not totally, but in pertinent part.

It is a four-count indictment:

"The Grand Jury charges that on the 29th day of April, 1974, in the Eastern District of New York, a Grand Jury of the United States of America was conducting an inquiry to determine, among other things whether in connection with a case of United States of America versus Joseph Doe, Criminal No. 73-1995, there had been committed in the Eastern District --

MP. GALLINA: four Honor, may we approach the bench for a moment?

THE COURT: Side bar.

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(Side bar follows.)

MR. GALLINA: If your Honor please, if you recall prior to the trial, I moved to have your Honor restrict the Government from presenting in its opening statement certain materials that it knows it cannot present during the trial.

THE COURT: You did.

MR. GALLINA: And that I asked your Honor to also not permit the reading of two counts of that indictment as being inflammatory and prejudicial because the Government well knows it has no evidence to support those counts.

It is apparent that the Government is again going to read that same indictment which contains --I believe, according to a plot and a plan by the Government, the recited testimony from the Grand Jury/ of a witness who they know will not testify in this court and will not testify to those matters in this court.

> THE COURT: You mean, Counts 3 and 4? MR. GALLINA: Yes.

Just for the purpose of again emphasizing that testimony in the Grand Jury to this jury. I'd ask your Honor again to restrict and order the Covernment

Opening - Shanley

from not reading these counts to the jury and not reading that testimony to the jury.

THE COURT: Mr. Shanley?

MR. SHANLEY: four Honor, the Government intends to prove these four counts. Because the -- a witness -- a witness right now is a fugitive. We fully expect to apprehend him and have him here to testify and as your Honor pointed out, it is the witness' decision whether or not he's going to testify or not when he gets on the stand and under oath.

The Government has no reason at this point, the witness having testified once before the Grand Jury, that he is now not going to, except on the statements from his attorney. We can't be bound by what the attorney says. We have to prove our case.

MR. GALLINA: The witness appeared with his attorney in this courtroom and stated both to Mr. Shanley and to myself that he is not going to testify in this case in the fashion in which the Government wishes him to. He's not going to do that.

MR. SHANLEY: That's the chance the Government will have to take.

THE COURT: The Court feels that possibly a rereading of the indictment might be inflammatory

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and it might be prejudicial and the Court will restrict the Government to a statement by Mr. Shanley of what the Government intends to prove and the Court will request that the Government do not go through the indictment and read the indictment as part of its opening.

You may use it, you may use it in your closing, but not at this time.

MR. SHANLEY: Your Honor, are you directing me not to do this?

THE COURT: fes, I'm directing you not to do

it. I am directing you to make an opening statement
which will set forth what the Government intends to
prove in connection with each count of the indictment.

I am directing you not to read the indictment as part of the Government's opening statement. That is an order of the Court.

MR. SHANLEY: May I summarize it?

THE COURT: You may summarize. Come back, come back.

MR. GALLINA: Yes, your Honor.

THE COURT: I will permit you to summarize it. I can't stop you on that. You may summarize it but not read it. You may summarize it, in any

fashion, any manner and any way that you see fit.
That's perfectly all right.

MR. SHANLEY: Will the Court inform the jury that I -- the Government -- you instructed the Government, directed the Government not to read the indictment?

THE COURT: Do you wish me to do this?

MR. SHANLEY: I don't know.

THE COURT: No. If you wish me to, I will.

If you wish me to, I will.

MR. SHANLEY: All right.

I'll do it. I'll handle it.

THE COURT: Do you wish me to ?

MR. SHANLEY: No, your Honor.

THE COURT: All right.

(In open court.)

MR. SHANLEY: Ladies and gentlemen, in order to save your time, perhaps I could best, as regards the indictment, just sort of summarize the various counts in the indictment.

Count One -- the Grand Jury met on April 29th,
1974. That's the date that Mr. Caputo testified
before the Grand Jury. He testified at length
and the Government charges that during that testimony

Opening - Shanley

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he made four -- committed four separate crimes. Committed -- made false declarations four different points during his testimony:

The first one, Count One, he was confronted with an FBI report, which is called a 302. fou will probably hear that term in the course of the trial. 302 is an PBI report, which an agent writes down the results of an interview.

He was confronted with a 302 by -- which was written by two agents of the FBI, namely, Robert Frank and Bob Sweeney, and which 302 says that Caputo admitted that he'd be able to handle the Pifth Precinct of New York City Police Department in regard to gambling matters.

And he admitted that he may have paid off a small amount to the Police Department in operation of a parking lot which he ran.

During the course of Mr. Caputo's testimony he denied making this statement to agents of the Pederal Bureau of Investigation.

Count Two involves another interview which he had with the Federal Bureau of Investigation, with Assistant Director John F. Malone, and Anthony Villano, who was a Special Agent.

During that interview, which took place in March of 1973, the agents of the Federal Bureau of Investigation recorded his statements and one of his statements to them was, or part of his statement to them was that he had paid police officers when he was involved in the gambling business.

When confronted with this statement, Mr. Caputo denied having made it to Mr. Malone and Agent Villano.

Count Three, Mr. Caputo was asked whether or not he had -- had a conversation with one Joseph Schiaffino, who was a patrolman at that time, in 1971.

He was asked whether he had a conversation with Mr. Joseph Schiaffino at the Paris Bar, which is downtown New York, in which he asked Mr. Schiaffino to contact one Sergeant Eugene Statile for him.

Mr. Caputo denied that under cath. That's Count Three.

Count Four, Mr. Caputo was asked and I'm paraphrasing -- whether or not he had talked to Mr. Schiaffino after Mr. Schiaffino had testified in that same Grand Jury.

Mr. Caputo denied having talked to Mr. Schiaffino at that time and which time he also

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Opening - Shanley

Mr. Schiaffino's appearance in the Grand Jury.
Now, that's Count Four of the indictment.

Now, what's the Government going to prove with regard to these counts? Well, we'll -- the Government intends to call the Court Reporter, the Grand Jury Reporter, who took the notes and had them duly transcribed, of Mr. Caputo's testimony.

We will call the Foreman of the Grand Jury,
Mr. Ralph Wilkinson, who will explain Mr. Caputo
was there, took the oath and what the investigation
was about.

Now, there will be other witnesses but rather than pinpoint exactly what witness will say what, I'm going to try to give you a factual summary of the evidence which will come collectively from the mouths of all these witnesses.

Mr. Caputo lived on Monroe Street, which is on the lower East Side. It's in the Fifth Precinct. The Fifth Precinct is an area which is around Chinatown and perhaps east of Chinatown. And south a little bit.

And to the south of the Pifth Precinct, is the First Precinct, which includes the Wall Street area

Opening - Shanley

and the lower West Side.

Now, you will hear references made to the Fifth Precinct and the First Precinct during the course of this trial. In early 1971, Mr. Caputo was arrested for gambling, on a gambling charge, Federal gambling violation.

Mr. Schiaffino. Mr. Schiaffino, in 1971, was a police officer. We ran, with the help of his family, he ran a bar called the Paris Bar, which is located on South Street, on the corner of South Street and Peck Slip. It's right near the Fulton Fish Market, very close to the Fulton Fish Market.

Mr. Caputo approached Mr. Schiaffino early one morning. Mr. Schiaffino and the Paris Ear has rather odd hours. It did then, because of the trade which they got at four or five o'clock in the morning from the people coming in with the fish on the Pulton Fish Market.

They had hours which they were allowed to stay open which was a little different from normal restaurants. And he approached Mr. Schiaffino around four or five, very early in the morning and he asked Mr. Schiaffino if he would contact Eugene Statile,

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Opening - Shanley

Sergeant Eugene Statile of the Pirst Precinct.

Mr. Schiaffino said: He doesn't come to work yet. Come back later and I'll call him. Around eightish in the morning, in a spring day, Mr. Caputo reappears and Mr. Schiaffino calls Sergeant Eugene Statile for Mr. Caputo and tells Mr. -- Sergeant Statile that there is a gentlemen there to see him.

The meeting took place. MR. Schiaffino wasn't present when the meeting--personally there observing the meeting, but it took place.

Now, this is in 1971. A few weeks later, three or four weeks later, two weeks, approximately, the gambling arrest -- the gambling charge lodged against Mr. Caputo was dismissed because it was a very very weak case and it was dismissed against him.

MR. CALLINA: Your Honor, may we approach the bench?

THE COURT: fes. Come up.

(Side bar discussion follows.

THE COURT: Co ahead.

MR. GALLINA: The prosecution has decided in the face of its full knowledge that the defendant was innocent in that case and that the charges were dismissed against my client, because he was

innocent, has implied that the only reason that the Government dismissed the case was because the charges --because the evidence was weak against him.

That in fact he was really guilty but the evidence was weak and I move for a mistrial and the withdrawal of a juror.

MR. SHANLEY: This is -- Mr. Caputo's own testimony in the Grand Jury. He says that, "The charges were dismissed against me because they were weak," and that will be in evidence.

THE COURT: That's Mr. Caputo's statement?

MR. SHANLEY: Mr. Caputo's testimony, and

his testimony -- his testimony which agents will

say to -- Mr. Caputo told him that.

THE COURT: Mr. Gallina?

MR. GALLINA: That has no relevancy whatsoever and I don't know if that is the testimony. I'd like to see the --

MR. SHANLEY: You've got his Grand Jury testimony.

MR. GALLINA: I don't remember that part.

THE COURT: Do you want a chance to look at

it?

MR. GALLINA: Yes.

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72 Opening - Shanley THE COURT: You want to take a short break? MR. GALLINA: I would think so. THE COURT: All right. We can do that. THE COURT: All right. We will take about a When the jury is out, please do not discuss the case, even among the jurors. The jury may go out for a ten-minute adjourn-(The following occurred in the absence of the THE COURT: All right, gentlemen. Look and then we will take it after. I have another matter now, gentlemen.

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THE COURT: Come up at side bar.

(The following occurred at side bar.)

MR. SHANLEY: To take it in proper chronology, your Honor, when the first interview took place between Agent Frank and Agent Sweeney and Mr. Caputo, they told him at that time that following his arrest the evidence against him was reviewed and after a few weeks it was determined there was insufficient evidence against him to uphold successful prosecution.

A subsequent interview with Mr. Caputo with Mr. Malone and Tony Villano, Caputo told them that the Government had no case and the information furnished to the Government was completely false.

In Mr. Caputo's grand jury testimony, he makes reference to a fake arrest, a phony arrest on a number of occasions.

I certainly think there is plenty of evidence before this jury.

THE COURT: What does he say?

MR. GALLINA: Your Honor, on the page of the interview -- may I cite each page -- may I say this to your Honor:

Again, the prosecution has absolutely misstated the facts and they have led this jury astray by implying

that the dismissal against my client was based on insufficiency of evidence and therefore he was guilty. The prosecution further came before this bench and claimed that they were ready to have grand jury testimony to show that my client admitted in the grand jury that the dismissal against him was based on insufficient evidence. I direct your Honor's attention to page 12 of the grand jury, lines 23 terough 24. He says: "I said everything is a lie, lie, lie." But he did say, "I can help you," meaning identify who was an informant. Now that is concerning that. THE COURT: Yes. MR. GALLINA: He then goes on, on page 13, line 7, and he said, "This is all lies." On page 20, line 6, he said when he was asked questions: "Do you have any gambling interest in Greenpoint, Brooklyn? "Answer: My God, never." And even if we want to imply, and this is where the prosecutor implied that he had impliedly admitted that he was involved in gambling in Brooklyn with the Colombo group, and this is on page 23, line 24:

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very bad informant. I slept, turned and turned. Why

didn't you harp on this thing, but he got away from --

he started asking me stupid questions and I looked at

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73 him. You made this complaint, you put me down with 1 Joe Colombo. You put two hundred runners. I wasn't 2 even in the business, Tony." 3 Then it was claimed by the prosecution as we 4 walked away from the bench, and I said, "It was in a 5 report?" 6 And he presented to me Mr. Malone's report. 7 May I have that? 8 THE COURT: That isn't what he told the Court. 9 MR. SHANLEY: I said that the agents will 10 testify. I said the agents will testify. 11 THE COURT: That is not a basis for what you 12 did. 13 MR. SHANLEY: Your Honor, the evidence will be, 14 there will be evidence that the arrest was -- the 15 complaint, the complaint was dismissed because of 16 insufficient evidence, that is what they are going to 17 testify to. 18 THE COURT: That is not a proper basis for the 19 statement that you made before this jury. That is not 20 a basis for your doing that. They might testify to 21 that, but you would have to put it in that particular

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way exactly. The way you put it was that because something happened strange --

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THE COURT: I will do that.

MR. GALLINA: And that there was no evidence ever

THE COURT: Convicting him.

MR. GALLINA: (Continuing) He was absolutely innocent of those charges.

MR. SHANLEY: I don't think I should make that kind of a statement. It was insufficient evidence.

THE COURT: You tell me what kind of statement
I am to make then if you don't think what I suggest
should be done. You tell me how I shall put it.

MR. SHANLEY: That the Government, the Government will introduce evidence, statements, the agents will testify that he told Caputo --

THE COURT: I am going to let you tell them that.

You tell me how I should correct for the jury the statement that you made that was improper. You tell me how I should correct it, or do you want to correct it?

(continued next page)

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MR. SHANLEY: Let me think about it for a minute. That is how to correct it.

Your Honor, what counsel is worried about is that the jury now thinks that the defendant was guilty, that is that in the minds of the jury the defendant was guilty of this gambling case, and I don't, I don't see how that seed has actually been sown yet.

I will simply state --

THE COURT: You sowed the seed and the jury now knows it. No question. You sowed the seed.

MR. SHANLEY: To go to the next step, though, I will correct my statement by --

THE COURT: How?

MR. SHANLEY: By saying that the agents will testify --

by saying that the charges against John Caputo were dismissed and no inference of any type or any presumption is to be made that there was any guilt as to John Caputo, that is that the Government could under other circumstances have proven that. There should be no inference, no presumption.

The only way to correct it is for the Court to correct it.

MR. GALLINA: I could ask your Honor, even though

I don't agree that your Honor can cure it by instructing the jury in any fashion at this point --

THE COURT: I don't feel that it is that serious that I grant your motion.

MR. GALLINA: Then I want your Honor to say that at this point the charges were dismissed against the defendant Caputo and under the law and for all practical purposes he is to be considered absolutely innocent of any of those charges.

THE COURT: This is true.

MR. GALLINA: Again, I would ask your Honor to restrict the Government from offering any evidence from any Government agent or any Government witness that the Government believes that John Caputo may be guilty or may have committed this crime, but that the evidence was very weak, too weak to convict him and that he was in any way involved in this crime or that he was guilty of this crime in any fashion.

THE COURT: Mr. Shanley?

MR. SHANLEY: My witnesses will testify as to what they told Mr. Caputo and what Mr. Caputo told them.

THE COURT: Well, your witnesses on the Government's direct case?

MR. SLANLEY: Yes.

THE COURT: They will not be permitted, they

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will not be permitted to state that there was a presumption or an inference that he was guilty of that charge of which he was found innocent.

MR. SHANLEY: They are going to state what they told him, your Honor, and that is the way --

THE COURT: Oh, the Court will order you now not to permit your witnesses to so state as to the charge of which Mr. Caputo was found not guilty or of which charges --

MR. SHANLEY: He wasn't found not guilty; the complaint was dismissed.

THE COURT: It was dismissed, and as to that your witnesses will not be permitted to give an inference that he was guilty or any presumption that he was guilty.

MR. SHANLEY: Perhaps I need advice, your Honor, because this is what was explained to Mr. Caputo.

Now, if you don't want me to say these are the words that the agents used, they said following his arrest by the FBI that the evidence against him was reviewed and after a few weeks it was determined there was insufficient evidence against him to uphold a successful prosecution, that is what they told him --

THE COURT: That doesn't in any way add to the

view it certainly does.

THE COURT: Well, at this time, until there is

MR. SHANLEY: In the whole context of the inter-

THE COURT: Well, at this time, until there is a further showing of a necessity, possibly in a rebuttal, possibly in rebuttal, there I might permit you to use it, but in the Government's direct case you may not use it.

MR. SHANLEY: Thank you, your Honor.

THE COURT: All right.

Are you ready to proceed?

Bring the jury in.

(At 10:50 A.M. the jury took its place in the jury box.)

THE COURT: Ladies and gentlemen of the jury:

The gambling charge which the Government

formerly had against the defendant in this case,

John Caputo, those charges were dismissed, and as to

those charges the jury is to draw no inference nor have

any presumption that there may have been any deals as

to Mr. Caputo. Those charges were dismissed, so no

inference may be drawn as to those charges and

Mr. Caputo is not in any way to be considered guilty

by any means or under any circumstances or even a

some reason to believe that there was probable cause or something. MR. GALLINA: There is not. THE COURT: No, there isn't. It is probable cause but --MR. GALLINA: The Government on its own opening -- on its own complaint dismissed the charges against him because he was mis-identified, and we know that. MR. SHANLEY: I didn't know that. MR. GALLINA: They have nerve to come in here and make these statements. MR. SHANLEY: I didn't know that. I didn't know that. Thank you, Mr. Gallina. (The trial then proceeded within the hearing of the jury:) (continued next page)

THE COURT: Ladies and gentlemen:

For the purpose of the gambling charge which was dismissed by the Government, Mr. Caputo is to be considered innocent as to those charges.

Thank you.

MR. SHANLEY: May I proceed, your Honor?

THE COURT: You may, you may.

MR. SHANLEY: Thank you.

MR. SHANLEY: (Addressing Jury) Now, ladies and gentlemen:

1973, early in 1973, the Federal Bureau of
Investigation instituted an inquiry into allegations
that an agent of the Federal Bureau of Investigation
and a police officer, the police officer's name was
Eugene Statile and the agent, the PBI agent's name
was Joseph Stabile, had received a total of \$15,000
from John Caputo to fix a gambling arrest back in 1971.

They interviewed Mr. Caputo on two occasions.

On the 19th of February, 1973, Agents Prank, Robert

Frank and Robert Sweeney interviewed Mr. Caputo at his
home on Monroe St. Mr. Caputo, during the course of
this interview, denied paying a substantial bribe.

He denied paying off an PBI agent. He denied paying

Eugene Statile. He denied the whole incident. This

was an interview on the 19th of February, 1973. But he did admit that he had paid cops during his gambling career. He admitted -- bear with me for one minute, please -- he admitted to agents Frank and Sweeney that he had been able to handle the 5th Precinct in regard to his gambling operation, the 5th Precinct being where his home is on Monroe St., and he also admitted to Agents Frank and Sweeney that he had been able to -- he may have paid off small amounts of monies to the police in the First Precinct where he operated a parking lot.

He made other statements during the course of that interview, which the agents will testify to. He testified — he admitted to the agents he knew Joseph Stabile, he admitted to the agents he had been contacted by Joseph Stabile shortly around the time of his arrest for gambling charges, but he did deny making a large pay-off to either Statile or Stabile — those names are very similar, Stabile, Statile.

The Bureau, the Federal Bureau of Investigation re-interviewed Mr. Caputo a few weeks later, on the 3rd of March, 1973, at his home in the Poconos. He has a house up in the Poconos which you will hear testimony about. It is in the woods. The Assistant

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Director in charge of the Federal Bureau of
Investigation, New York Office, John F. Malone, and
Special Agent Anthony Villano, interviewed him on the
Saturday afternoon in his house in the Poconos.

Once again he denied making a payoff in sums of money to fix this gambling case or denied making any kind of a \$5,000 or a \$10,000 or \$15,000 payoff.

But he did admit that he had paid police officers when he was involved in the gambling business.

He was asked to take a lie detector test and he refused.

MR. GALLINA: Your Honor, may we approach the bench?

THE COURT: Come up.

(The following occurred at side bar without the hearing of the jury.)

MR. GALLINA: Your Honor, I now move for a mistrial. I don't need to say anything more.

MR. SHANLEY: This is in the statement that he asked him and he refused.

I mean is the Government not allowed to introduce into evidence what --

MR. GALLINA: I ask that the jury be excused so we can argue this out fully.

THE COURT: Yes, all right.

(The trial then continued within the hearing of the jury:)

THE COURT: The jury may go out for a short adjournment.

Please don't discuss the case.

The jury may leave.

(At 11:00 A.M. the jury left the courtroom.)

MR. GALLINA: Your Honor, may I make a

statement?

In all the years that I have practiced before the Federal and State benches, I have never, never, never seen such an example of devious and despicable trial tactics as I have just seen happen before this jury.

That question of his having been asked to take a lie detector test and refusing to take a lie detector test, whether it is true or isn't, is one that has no relevancy whatsoever to the issues before this Court, none, none. It can't even be reasonably argued.

Your Honor, for counsel to do this without making either the defense or the Court aware of what he was going to do is certainly more than ample proof

of the fact that the prosecution knew that that was what he was going to do and was absolutely despicable.

I don't think under the laws and the cases, I don't think that there is any support whatsoever in any fashion for any such statement and I move for a mistrial.

THE COURT: Yes, Mr. Shanley.

MR. SHANLEY: Your Honor, counsel has been in possession of these statements for nigh over a year now.

THE COURT: Yes, but, Mr. Shanley, you seem to think that because an FBI agent has said something or has done something, that on the basis of his action you have a right to make out a case against the defendant.

The defense's position is perfectly correct here, and you don't have a right to do that.

MR. SHANLEY: Your Honor, I was interrupted in my statements. I was going to say teat he had no faith in a lie detector test and he was willing to go before a priest.

THE COURT: That does not give you the right under these circumstances.

In making your opening, you have to present what

is credible evidence, credible proof and something which goes directly to the indictment which is before the Court.

You are not trying Mr. Caputo's credibility in an opening statement, and that is what you seem to be doing, and that is not the purpose of your opening statement, to try Mr. Caputo's credibility.

MR. SHANLEY: Your Honor, I was not. I was simply relating what is going to be testified to.

THE COURT: Well, I will tell you now if you continue to do this I must grant a mistrial, and if you don't know what you are doing, you had better sit down a few minutes and look.

MR. SHANLEY: I thought the Government on this situation where it is a qualified statement that that is perfectly admissible.

THE COURT: I cannot permit it.

You're actually trying this man's credibility in an opening statement and this is not a proper place for you to do that.

You are supposed to advise the jury as to what proof you have which will prove the counts that are before the Court. You are not to try his credibility here.

MR. GALLINA: Your Honor, presume that the defendant was on the stand, let us go so far as to presume the defendant's credibility was on the stand, there is no way that the prosecution under the laws in this Second Circuit could confront him with the fact that he had refused to take a lie detector test.

THE COURT: No way he could do it.

MR. GALLINA: That is correct, and it is reversible error and he committed that error now and there is no way we can excise from the mind of this jury the fact that he told an FBI agent he would not take a lie detector test, no way.

(continued next page)

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THE COURT: Anything further, Mr. Shanley?

MR. SHANLEY: Nothing except, your Honor, I was going to qualify that statement.

THE COURT: That doesn't permit you to do it.

If you expect to use your opening statements on the credibility of Mr. Caputo, which is really not before us, and what Mr. Gallina told you is true, if he were even on the stand you couldn't ask him that.

I will take five minutes.

(Recess.)

THE COURT: Mr. Gallina, make your motion.

MR. CALLINA: Your Honor, at this time the defendant moves for a mistrial and the withdrawal of a juror on the rounds that the error by the prosecution, the statement by the prosecution has so prejudiced the jury, or possibly prejudiced the jury that the defendant could not have a fair trial.

THE COURT: Mr. Shanley.

MR. SHANLEY: four Honor, I am well aware that evidence -- that polygraph tests are inadmissible in Federal Courts. But I have -- I did some research on this problem and I didn't find any cases which said that a statement as to whether or not a person would take a polygraph test is inaddmisible, whether he would or he would not. I think there is a

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no question about it, although there is -- Mr. Branch is getting a case for me, a District Court case in Michigan, in which it was admitted into a Federal court, the results of a polygraph test.

I think there is a distinction here, and under the circumstances, when it was qualified, the question was asked and he came back and said, "I'll do thisn and I'll do that, but I have no reliance on this."

This is not -- this is not error, your Honor, in the sense that it's inadmissible evidence, because there doesn't seem to be any law as to whether that question -- the fact that the question was asked can be admitted into evidence. It just doesn't seem to have come up.

I have some cases here and I was looking for that point.

THE COURT: Anything further, Mr. Gallina?

MP. GALLINA: Your Monor, insofar as just the rationale, it's obvious that the evidence could not have been offered even in cross-examination of my client. The evidence in the statement, or the purported evidence in the opening statement was offered in such a fashion by the prosecution, well

knowing that it had no relevancy or bearing upon any of the issued in this case, and it was done only, only, obviously, for the purpose of prejudicing this jury, convincing this jury that this man is really guilty; if he weren't guilty of the underlying crimes and everything else that is happening in this case, he would have taken a lie detector test.

That is the clear message to the jury, and especially now, even if it is not brought out in evidence, it is known to the jury he refused to take a lie detector test.

There is just no way of curing it, your Honor.

MR. SHANLEf: four Honor, I disagree. I would certainly disagree with Mr. Gallina that it was an effort on the part of the Covernment to prejudice the jury.

THE COURT: The Court feels it's highly prejudicial, and the motion for the withdrawal of a juror and the declaration of a mistrial by the defendant is granted.

MR. SHANLE1: fou won't wait until I get that case, your Honor?

THE COURT: The motion is granted, counselor.

MR. SHAMLEY: Thank you, your Honor.

THE COURT: Bring in the jury.

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THE COURT: Ladies and gentlemen of the jury, the Court has granted a request for a mistrial by the defendant, in view of the prejudicial statement the prosecutor made and which does not appear could be cured.

Under these circumstances, the jury is discharged with the thanks of the Court and you will return to the Central Jury Room on the first floor.

Thank you and have a nice day.

(Jury discharged.)

THE COURT: Gentlemen, would you want to pick your other jury?

MR. GALLINA: I have no objection to it, your Honor. I have a small scheduling problem. I wanted to try a case, there is a multi-defendant case starting next week before Judge Cooper.

THE COURT: If you get on this one now it will probably go into next week.

MR. Shanley?

MR. SHANLEY: I am ready to pick another jury, your Honor.

THE COURT: We will hold the cards so that these jurors won't be in the group that comes up. MR. GALLINA: I am afraid I'm going to be in

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bad conflict here with scheduling. I hate to lose the momentum but --

THE COURT: These are problems we have. I don't know what to tell you. It's for you to say.

MR. GALLINA: Could I check out my scheduling and come back here at two o'clock?

THE COURT: fou want to pick it this afternoon?

MR. GALLINA: Yes, if I can go forward I'd

like to be here at two o'clock to go forward. I would

like to check out the scheduling problem.

THE COURT: I don't see why I shouldn't give you the chance to do that. Two o'clock.

MR. GALLINA: For the record, may I point out one other thing, I know I didn't think of it, I should have. The problem is this jury now may go down to the General Panel, may go downstairs and discuss what happened.

It is evident that the last statement that was made by the prosecutor was prejudicial, and they may spread the word out among the General Panel that my client refused to take a lie detector test.

I don't know how we are going to cure that by asking the General Panel whether they heard such a thing.

THE COURT: Maybe we should have sent them

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MINUTES OF NOVEMBER 7, 1975 UNITED STATES DISTRICT COURT 2 EASTERN DISTRICT OF NEW YORK 3 4 UNITED STATES OF AMERICA : 5 6 -against-: 751,247 JOSEPH SCHIAFFINO, 7 Defendant. : 8 9 10 11 United States Courthouse Brooklyn, New York 12 November 7, 1975 13 14 Before: 15 HONORABLE HENRY BRAMWELL, U.S.D.J. 16 17 18 19 20 21 22 23 MICHAEL J. MIELE OFFICIAL COURT REPORTER 24

DAVID G. TRAGER, ESQ., United States Attorney for the Eastern District of New York

BY: RICHARD L. SHANLEY, ESQ.,
Assistant U.S. Attorney

DENNIS PETERSON, ESQ., Attorney for Defendant.

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THE COURT: Is the defendant here?

MR. PETERSON: Yes.

MR. SHANLEY: As your Honor knows, on Wednesday your Honor ordered a Bench Warrant to issue for the arrest of Joesph Schiaffino who was a material witness in the United States versus John Caputo.

THE COURT: We had no idea why he was not here.

MR. SHANLEY: He was not here and Mr. Peterson was here and explained what part he had in the conversations he had with Mr. Schiaffino.

THE COURT: I will hear Mr. Peterson.

MR. PETERSON: Last evening at approximately 5:00 or 5:30 p.m., Mr. Schiaffino from Ellenville, New York, called me up to inquire as to what the status of the case is. Pardon my crudeness but I said, "Joe, get your butt down here quickly." He was requested to meet me here at 2:00 p.m. in the coffee shop outside today. He went home early this morning knowing quite well that the FBI was looking for him. He cameback from upstate voluntarily, nobody had to seek him out, if indeed he had any intention to not appear in this action, he wouldn't have come back to New York on his own.

My application is to vacate the bench warrant. He spent 22 years with the Police Department, has five young children, a home in Staten Island, has a wife who is a nervous wreck in this matter as a result of many interferences with the FBI with herself and her surrounding neighbors.

He is a property man, also works in New York, director for his father's corporation, his roots are firmly in this town, has represented to me and Mr. Shanley he intends to appear whenever called.

He knows what is at stake if he does not appear. He will indeed appear. He has shown and exhibited his intention to appear.

THE COURT: Yes, Mr. Shanley?

MR. SHANLEY: Well, your Monor, I think there is very serious unanswered questions here.

On Monday, as you were told the other day,
Mr. Peterson's office was contacted to tell
Mr. Schiaffino to be here Wednesday morning.
Mr. Schiaffino obviously didn't appear here Wednesday morning.

Now, the problem here arises whether or not Mr. Schiaffino knew that he was supposed to appear here --

THE COURT: I wouldn't go into that at this point.

Mr. Schiaffino, you are aware of the situation before the Court?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is there any reason why you wouldn't be able to come to Court?

THE DEFENDANT: I guarantee my appearance here Monday morning.

THE COURT: That is all I want.

THE DEFENDANT: I guarantee my --

THE COURT: What do you want?

MR. SHANLEY: I think the man should be remanded --

THE COURT: I will not remand him. I do not intend to remand under these conditions.

The man comes here and tells me he is going to be here Monday. I will permit him to go home and come in on Monday. If you want to say anything else, put it on the record.

MR. SHANLEY: The Government's position is that in the light of the experience this past week and in light of the experiences when he was a material witness when a material witness was necessary to arrest him, we have no guarantee

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Honor.

on his word that he will be here Monday morning.

THE COURT: As of now, I am going to take his word, and I have never seen this man in my life before.

As of now, I am going to take his word.

MR. SHANLEY: Your Honor, to refresh your recollection, a number of months ago, Mr. Peterson and Mr. Schiaffino stood before you.

THE COURT: He was before me?

MR. SHANLEY: Yes, and it was agreed on three hours notice that he would be available to testify at trial with Mr. Dennis Peterson --

THE COURT: Well, he said he is coming in Monday and I will permit him to go. He understands if he doesn't appear and if we have to go out and get him, it may be a problem and at that time I will be required to remand him.

MR. SHANLEY: May I ask at the very least, your Honor, that some sort of bail be posted?

THE COURT: Bench warrant is vacated.

Mr. Schiaffino, will you come in on Monday?
THE DEFENDANT: I certainly will, your

THE COURT: All right. The case is set for trial on Monday. I don't know what exactly will

THE DEFENDANT: I will be here.

THE COURT: Application for bail is denied.

MR. SHANLEY: He is released on his own recognizance?

THE COURT: He is released. He is not here, he is here, he is not here, that I am holding him, but just released.

MR. SHANELY; You realize that the warrant was issued for bail jumping although he was on his own recognizance?

THE COURT: Within the last week, I am well aware of what happened in this case. I am well aware of what happened on this case, and Mr. Schiaffino may leave and the case is on for Monday morning and I will expect that if everything is all right with him that he will be able to appear at that time.

I am not putting any restraints on him, none whatsoever.

MR. SHANLEY: May I ask if your Honor would direct him to appear at 11:00 o'clock on Monday morning?

THE COURT: All right. 11:00 o'clock Monday morning.

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THE DEFENDANT: I will be here at 10:00 o'clock, your Honor.

THE COURT: Anything further?

MR. SHANLEY: No, your Honor.

NOTICE OF MOTION TO DISMISS INDICTMENT, SUPPORTING AFFIDAVIT AND MEMORANDUM OF LAW DATED NOVEMBER 10, 1975

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

NOTICE OF MOTION

- v -

JOHN CAPUTO,

Ind. No. 74 Cr. 621

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of GINO E.

GALLINA, ESQ., the accompanying Memorandum of Law, and all of the prior proceedings, the undersigned will move this Court for an order dismissing the indictment on the ground that further proceedings are barred by the double jeopardy prohibition of the Fifth Amendment to the United States Constitution; and for such other and further relief as the Court deems just and proper.

DATED: New York, New York November 10, 1975

YOURS, etc.,

GINO E. GALLINA, ESQ. Attorney for Defendant 30 Broad Street New York, New York 10004 (212) 944-1550

TO: HON. DAVID TRAGER
United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Attention: Richard L. Shanley
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT	
EASTERN DISTRICT OF NEW YORK	

UNITED STATES OF AMERICA,

- V -

AFFIDAVIT

Ind. No. 74 Cr. 621

JOHN CAPUTO,

Defendant.

STATE OF NEW YORK

SS.

COUNTY OF NEW YORK)

GINO E. GALLINA, being duly sworn, deposes and says:

- 1. I am the attorney for the defendant John Caputo, and am fully familiar with the facts and circumstances of this case.
- 2. Indictment 74 Cr. 621 is a four-count indictment for perjury, the first two counts relating to the denial that certain statements were made to FBI agents, and the last two counts relating to denials of discussions with one Joseph Schiafinno.
- 3. Motions were made to dismiss the first two counts on the ground of "immateriality" and the trial court reserved decision on the ground that this issue could not be decided until evidence had been taken; just before the prosecutor opened the Court perhaps indicated it had doubts about this matter by reminding the prosecutor that it was his duty and burden to demonstrate materiality on his direct case (Mins. 11/6/75 at 52-53).

- 4. Joseph Schiafinno disappeared the day before the trial was to commence (jumping bail in the process, since he had been arrested as a material witness and released); he had previously stated in open court that he was not going to testify, at least not as the prosecutor had expected, and would take the Fifth Amendment; accordingly, a motion had been made that the prosecutor be prevented from referring to Counts 3 and 4 because he knew he could not present any evidence to support these counts (Mins. of 11/5/75 at 33-49; Mins. 11/6/75 at 55, 62).
- 5. Against this background the prosecutor committed three deliberately prejudicial errors in its opening statement*:
- (a) The prosecutor began reading the indictment and it was clear that he was going to read counts 3 and 4 despite the fact that Mr. Schiafinno would not be present to testify; the Court restricted the prosecutor to "summarizing" what he intended to prove on the ground that the reading "might be inflammatory and it might be prejudicial" (Mins. 11/6/75 at 61-65); by these acts the Court partially obviated the first error, i.e., telling the jury about charges the prosecutor knew could not be proved;
- (b) The prosecutor stated that the 1971 gambling charge against Mr.

 Caputo (which formed the background out of which this entire case arose) had
 been dismissed because it was a "very, very weak case"; when defense counsel
 stated that the prosecutor knew the charge had been dismissed because the

^{*}The entire opening statement is annexed to the motion papers.

defendant was innocent, the prosecutor responded that defendant's Grand Jury testimony was that "The charges were dismissed against me because they were weak"; when defense counsel read the Court defendant's Grand Jury testimony that his arrest was a "phony" the prosecutor retreated and said the FBI Agents would say defendant told them the charges had been dismissed for insufficiency; the Court admonished the prosecutor not to put forward as established fact what agents would merely testify to, overruled the motion for a mistrial and told the jury the defendant was presumed innocent of the gambling charge (Mins. 11/6/75 at 70-85);

- (c) Less than 3 pages later, the prosecutor stated "He [defendant] was asked to take a lie detector test and he refused"; he tried to justify the statement on the ground that an FBI Agent had told him about it but the Court repeated that it had just told him that that was not a basis for an opening statement, that that statement was wholly improper, and "if you continue to do this I must grant a mistrial"; the Court then recessed and upon returning requested defense counsel to make a motion for mistrial, which it granted (Mins. 11/6/75 at 87-94).
- 6. It is respectfully submitted that these "errors" were deliberately and purposefully committed with the intention that the Court would be forced to declare a mistrial, which would give the prosecutor time to remedy the now-obvious defects in his case.
- 7. The bad faith of the prosecutor has been evident throughout the pendency of this case; upon information and belief FBI Agents told defendant

that nothing he told them would ever be used against him in any way and yet they used what he told them against him in the Grand Jury (Mins. 2/24/75 at 23-27, Mins. 2/25/75 at 17, 97); when the defendant refused to give the government what they wanted he was indicted only hours before the six months ran out (Mins. 2/26/75 at 192); when a motion to suppress was made the prosecutor demanded that defendant take the witness stand and continually asked the Court for premature rulings against defendant's position (e.g., Mins. 2/24/75 at 19, 24; Mins. 2/25/75 at 23, 27, 90-92); and, when directed by the Court to turn over clear Brady material to defendant and possible Brady material to the Court for in camera study he was so unresponsive the Court said "You know, your entire approach at this point is an evasion of the issue" (Mins. 11/5/75 at 10, 14, 20-33); then came the opening and mistrial.

8. It is respectfully contended that the prosecution of this case has been an exercise in delay and bad faith by the government, topped off by deliberately injecting error into the case during the opening statement; as more fully set forth in the accompanying Memorandum of Law, this Court should declare that defendant may not be put on trial again and should dismiss the indictment.

WHEREFORE, it is respectfully requested that an order issue dismissing the indictment, and for such other and further relief as the Court deems just and proper.

GINO E. GALLINA

Sworn to before me this 10th day of November, 1975.

UNITED	STA	TES	DIS	TRI	СТ	CC	TRI	
EASTER	N D	ISTR	CT	OF	NE	W	YORI	K

UNITED STATES OF AMERICA,

JOHN CAPUTO,

74 Cr. 621

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT

GINO E. GALLINA, ESQ. Attorney for Defendant 30 Broad Street New York, New York 10004 (212) 944-1550

JOEL A. BRENNER, ESQ. Of Counsel

UNITED S	TATES	DISTE	RICT	COURT
EASTERN				

UNITED STATES OF AMERICA,

JOHN CAPUTO,

74 Cr. 621

Defendant.

STATEMENT

This Memorandum of Law is submitted in support of defendant's motion to dismiss the indictment on the ground that the Double Jeopardy Clause of the Fifth Amendment prevents any further proceedings against him.

ARGUMENT

POINT I

SINCE THE DECLARATION OF MISTRIAL
WAS BROUGHT ABOUT BY THE DELIBERATE
MISCONDUCT OF THE PROSECUTION AFTER
DEFENDANT HAD ALREADY BEEN PLACED
IN JEOPARDY, THE DOUBLE JEOPARDY
CLAUSE PREVENTS ANY FURTHER PROCEEDINGS AGAINST DEFENDANT

Under the federal system, a defendant is considered to have been put "in jeopardy" once a jury has been impaneled and sworn. United States v.

Jorn, 400 U.S. 470, 474-75 (1971), Green v. United States, 335 U.S. 184,188 (1957). See, also, United States v. Gentile & La Ponzina, F. 2d, slip op. 239, 247 n. 2 (2d Cir., 10/22/75):

"[I]n weighing the harm to the defendant incident to a new trial against the desirability of the court's protecting a defendant from prejudice (and retrial after a possibly successful appeal), even without an application on his part, the length of his exposure at the first trial is a relevant consideration."

Here, the mistrial came more than 13 months after defendant had been indicted, after the defendant had sat through a 3 day hearing on a suppression motion (2/24 - 2/26/75), after a jury had been selected and sworn, and after two more days of pre-opening colloquy. Though no testimony had yet been taken, the "length of his exposure" was quite considerable. Ibid.

Not only had jeopardy attached, it cannot reasonably be contended that there was any waiver of the double jeopardy protection. It is true that, in general, where defense counsel requests a mistrial this is considered both a waiver of double jeopardy and a consent to a re-trial. United States v.

Gori, 282 F2d 43 (2d Cir 1960), aff'd 367 U.S. 364 (1961). The situation here, however, is completely different.

Although it was defense counsel who originally moved for a mistrial after the "lie detector" reference, it was the court which called for the renewal of the motion after a short recess (Mins. 11/6/75 at 87-92). This indicates that the making of the motion was a mere formality ("Mr. Gallina: Your Honor,

I now move for a mistrial. I don't need to say anything more.") and that a mistrial would probably have been declared sua sponte because of the indefensibility of the remark.

Furthermore, the Supreme Court has repeatedly stated that where the deliberately improper actions of the prosecutor necessitate a mistrial, double jeopardy is not waived and prevents reprosecution. Illinois v.

Somerville, 410 U.S. 458, 464 (1973); United States v. Jorn, supra, 400

U.S. at 485 n. 12; United States v. Tateo, 377 U.S. 463, 468, n.3. See, also, United States v. Gentile, supra, slip op. at 248 n. 3: "There may be circumstances when a double jeopardy defense should prevail even though the declaration of a mistrial was not an abuse of discretion, e.g., when a prosecutor, sensing that things are not going well deliberately makes a highly inflammatory remark" (emphasis added). This is precisely what happened here!

Just moments before he was to open to the jury the Court reminded the prosecutor that he had the burden of demonstrating materiality on Counts 1 and 2 (Mins. 11/6/75 at 52-53). His most important witness on Counts 3 and 4 had made good his promise not to testify and had jumped bail (Mins. 11/5/75 at 40; Mins. 11/6/75).* The Court had indicated it would not even consider

^{*}After the Court's opening instructions to the Jury, the prosecutor asked for permission to return to his office to get the notes for his opening statement which he'd "forgot[ten]" (Mins. 11/6/75 at 59). One can almost see him making a last unsuccessful effort to locate his missing witness and then returning to the courtroom knowing that at least half his case was already lost, and the other half was in serious trouble.

granting a continuance until that portion of the prosecutor's case was reached which would require Schiafinno's presence (Mins. 11/5/75 at 42; Mins. 11/6/75 at 55) and the prosecutor knew that would happen very shortly (Mins. 11/5/75 at 49).

He first invited a mistrial by referring to what Schiafinno would testify to, though he knew Schiafinno was unavailable.

Failing to obtain a mistrial on his first attempt, the prosecutor embarked on a deliberate campaign of injecting error into the case. He told the jury that the underlying gambling charges against defendant had been dismissed because of insufficient evidence, thereby implying defendant might still have been guilty; he did this despite the fact that defendant's Grand Jury testimony was that the case was a "phony arrest". This is analogous to the bad faith of a prosecutor asking a defendant if he had committed a crime when he knew the defendant was innocent. Cf. United States v. Beno, 324 F2d 582, 588 (2d Cir. 1963).

Shortly thereafter he committed an error that a first year law student would not commit: he told the jury defendant had refused to take a lie detector test. It is a horn-book law that the results of a lie dector test are inadmissable; even less defensible is reference to a refusal to take such tests, particularly when reference to such refusal borders on an impermissable comment on the defendant's right to remain silent. Cf. United States v. Hale, U.S., 95 S.Ct. 2133 (1975).

As a result of the aforesaid errors the Court was forced to declare a mistrial.

In <u>Downum</u> v. <u>United States</u>, 372 U.S. 734 (1963) the prosecutor asked for and was granted a mistrial because some witnesses, essential to some counts but unnecessary for others, were unavailable. Although it was agreed that this unavailability was the result of "excusable oversight" the mistrial was held to have barred reprosecution. <u>Cornero v. United States</u>, 48 F2d 69, 71 (9th Cir. 1931) was held to state the "governing principle":

"The fact is that when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.* While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance on the furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy."

Even the dissent in <u>Downum</u> would have upheld the double jeopardy claim if there had been any "indication that the prosecutor's explanation was a mere cover for negligent preparation or that his action was in any way

^{*}Co-incidentally, when defense counsel reminded the prosecutor that Schiafinno had said he would not testify the response was "That's the chance the Government will have to take" (Mins. 11/6/75 at 63) (emphasis added).

deliberate". 372 U.S. at 742.

Since under <u>Downum</u> double jeopardy would have prevented a retrial if the mistrial had come during the presentation of evidence, the prosecutor deliberately tried to have the court declare a mistrial <u>before</u> that time. Although the prosecutor was ultimately successful in his nefarious scheme he should not be allowed to benefit thereby. The double jeopardy clause

"prevents a prosecutor...from subjecting a defendant to a second prosecution by discontinuing the trial when it appears the jury might not convict". Green v. United States, supra, 355 U.S. at 188.

See, also, <u>United States v. Gori, supra, 282 F2d at 48</u>: "The situation [of unintentional prosecutorial error] was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial...".

Or, to paraphrase the dissent in <u>United States v. Tateo</u>, <u>supra</u>, 377 U.S. at 473:

"The <u>purpose</u> of the prosecutorial misconduct in this case was to deny him the right to have the impaneled jury decide his fate, whereas this was merely the effect of the prosecutorial negligence in Downum".

In United States v. Jorn, supra, it was stated that:

"The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee". 400 US at 486.

In <u>United States</u> v. <u>Glover</u>, 506 F2d 291 (2d Cir. 1974) the Court had to decide if a defendant could be reprosecuted after a mistrial declared because the prosecutor belatedly advised the trial court it wanted to use statements of the defendant which implicated his co-defendants. The Court held that a re-trial was impermissible in language strongly applicable to this case:

"The District Court understood that double jeopardy normally attaches upon the empaneling of a jury competent to try the defendant, for it is then that a defendant is 'put in jeopardy.' Illinois v. Somerville, 410 U.S. 458, 467, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973); United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971; Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957); Wade v. Hunter, 336 U.S. 684, 688, 69 S.Ct. 834, 93 L.Ed. 974 (1949); Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904). Having been 'put in jeopardy', the defendant is thought to have the right to seek a favorable verdict from the jury which he has accepted as satisfactory. See United States v. Jorn, supra, 400 U.S. at 486, 91 S.Ct. 547; Downum v. United States, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L. Ed. 2d 100 (1963); Wade v. Hunter, supra, 336 U.S. at 689, 69 S.Ct. 834. The negative reason for this solicitude is that to permit the trial to be aborted might lead to mistrials covertly for the benefit of a prosecution that needs strengthening. See e.g. United States v. Kin Ping Cheung, 485 F. 2d 689, 691-692 (5 Cir. 1973). A mistrial can operate 'as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case.' Illinois v. Somerville, supra, 410 U.S. at 469, 93 S.Ct. at 1073 (per Rehnquist, J.), citing Downum v. United States, supra." (Id at 294)

The Supreme Court has upheld the right to reprosecute after a mistrial when it was found that the indictment was defective. Illinois v. Somerville, supra. The majority pointed out that there was no claim of improper action by the prosecutor:

"[T]he declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, Cf. Downum v. United States, supra, 410 U.S. at 464.

* * *

"This situation is thus unlike <u>Downum</u> where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case". Id. at 469

This is precisely what happened here. The prosecutor knew that when the time came to put Schiafinno on the witness stand Schiafinno would not be present. If the Court refused to grant a continuance or if Schiafinno could not be located, the prosecutor knew defendant would be acquitted. To prevent this from occurring he deliberately brought about a mistrial, hoping that in the "post-jeopardy continuance" he thereby obtained, he couls locate his missing witness and save his case. In Cornero v. United States, supra, adopted by the Supreme Court in Downum v. United States, supra, as stating the "governing principle", it was held:

"It is uniformly held that, in the absence of sufficient evidence to convict, the district attorney cannot by any act of his [e.g., a nolle prosequi] deprive the defendant of the constitutional

provision prohibiting a person from being twice put in jeopardy for the same offense." 48 F.2d at 71.

CONCLUSION

For the above stated reasons, the indictment must be dismissed.

Respectfully submitted,

GINO E. GALLINA, ESQ. Attorney for Defendant 30 Broad Street New York, New York 10004 (212) 944-1550

JOEL A. BRENNER, ESQ. Of Counsel

1	MINUTES OF NOVEMBER 10, 1975
2	UNITED STATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK
4	х
5	UNITED STATES OF AMERICA, :
6	-against- : 74-CR-621
7	JOHN CAPUTO, :
8	Defendant. :
9	х
10	
11	United States Courthouse Brooklyn, New York
12	November 10, 1975
13	10:00 o'clock A.M.
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15	Before:
16	HONORABLE HENRY BRAMWELL, U.S.D.J.
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22	DANIEL D. SIMON

OFFICIAL COURT REPORTER

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DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: RICHARD SHANLEY, ESQ. Assistant U.S. Attorney

GINO GALLINA, ESQ.
-andJOEL BRENNER, ESQ.
Attorneys for Defendant

THE CLERK: U.S.A. v. John Caputo.

THE COURT: It is my intention to go on with another case, a jail case, that the Court has with four defendants to be tried, and put the Caputo case over and try it as soon in the near future as I can get to it.

MR. GALLINA: Thank you, your Honor.

THE COURT: Is there anything that we have to do on it?

MR. GALLINA: No. I served upon the Court this morning a motion pursuant to the law of U.S. v. Gentile.

I would indicate to your Honor that since -if your Honor disposes of the motion it's finally
dispositive of the issue and the defendant has a right
to appeal that issue.

It is a motion basically to dismiss the indictment at this time --

THE COURT: Do you want to argue the motion this morning?

MR. GALLINA: Yes, your Honor. Maybe that would be --

THE COURT: If you want to, I will let you do it.

MR. GALLINA: Would the Government like some
time to answer?

THE COURT: Or would you like some time on it before you argue it? Do you want to argue it tomorrow?

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MR. SHANLEY: Your Honor, I got the papers today. I was not unsurprised that the motion was made to me now. However, the supporting papers of Mr. Gallina present some problems for the Government to answer. But I do not want --

THE COURT: Do you want to argue the motion now and then have the Government submit? Whatever you think you would wish to do is all right with the Court

MR. SHANLEY: I would be willing to argue the motion now and have the Government submit if the Court felt it necessary.

THE COURT: We can do that.

MR. GALLINA: May I just indicate to your Honor that we broke, I believe last Thursday around noon, and it was Thursday afternoon that I called your Clerk your Law Clerk --

THE COURT: Right.

MR. GALLINA: -- and indicated to him that I intended to make this motion.

THE COURT: Right. My Clerk advised me of this

MR. GALLINA: Thank you, your Honor.

MR. SHANLEY: Your Honor, one point: I would for the record before we start this argument -- I would like to point out so that the Court is under no misapprehension --

MR. SHANLEY: -- on Thursday after the mistrial

was declared by your Honor a Government witness went to see your Honor.

I would like to state, so that Mr. Gallina is perfectly aware of my position, that this witness went to see your Honor without the Government's consent and without the Government's knowledge.

THE COURT: What is the name of this witness?

MR. SHANLEY: Mr. Malone. When I returned to

my office and I had been informed that he had left to

see your Honor --

THE COURT: It was my understanding that

Mr. Malone would be here today, which is November 10th

MR. SHANLEY: He is here. But I wanted to inform counsel that the Government did not ask Mr. Malone to go to see your Honor for whatever reason he talked to you about.

THE COURT: He saw the Court and he asked that the Court — or what he told the Court was between November 12, 1975 and November 22nd or 23rd that he had a long-planned vacation. And he said that if necessary he would cancel the vacation. But it was something that he had planned for some time. And he wanted to apprise me of that fact. That is the only

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MR. BRENNER: Do you want to hear the argument

THE COURT: Yes, I will hear the argument right now.

MR. BRENNER: Before I proceed, your Honor, I would like to give your Honor one further citation which I ran across last night which is not in the memorandum. I have given it to Mr. Shanley. The name of the case is McNeal v. Hollowell, 481 F. 2d 1155, Fifth Circuit, 1973.

THE COURT: Thank you.

MR. BRENNER: We are dealing here with a motion to bar further prosecution of Mr. Caputo on the ground that the mistrial which was declared last Thursday was

necessitated by the deliberate and improper actions of the prosecutor during his opening statement. That in fact because of the recognized weaknesses in his case the prosecutor deliberately provoked the request of defense counsel for a mistrial and in effect forced the Court to grant the mistrial so that he could remedy the defects which had been pointed out to him in his case. And that based on that the Government should be prevented both by estoppel and by virtue of the double-jeopardy clause of the Federal Constitution -- should be prohibited from re-trying Mr. Caputo.

We have got basically three questions to answer, two of them are simple and one is a little complicated.

The first question is whether or not jeopardy has attached in this case. Clearly, it has. The Supreme Court has ruled that jeopardy attaches when the jury is empanelled and sworn. We had that as of Thursday when a mistrial was declared.

The second question is whether or not by requesting a mistrial defense counsel has waived the double jeopardy protection. Again, the answer to this is clearly no because the Supreme Court has repeatedly intimated, although never held, because it has never been presented with this precise issue, that if the request for mistrial is brought about by the deliberate

and inflammatory remarks of the prosecutor, by some deliberate and willful impropriety on the part of the prosecutor, then there will be no waiver because in effect the prosecution cannot claim waiver when the prosecution forced defense counsel or the Court to

declare the mistrial.

And in the third question, which is somewhat more complicated, although I think it is fairly clear on the facts, is did the Government deliberately provoke a mistrial by its actions during its opening statement?

Now the background of the case is fairly simple. It is a four-count perjury indictment. Two of the counts have been repeatedly challenged on the ground of materiality. As a matter of fact, just before Mr. Shanley opened on Thursday, your Honor having reviewed the voluminous 3500 material, pointed out to Mr. Shanley, reminded him, by the way, don't forget on your direct case materiality is in issue. We feel this is an indication, particularly coming in response to our motion to dismiss on the ground of materiality, that there were problems with whether or not the first two counts would withstand a motion to dismiss made during the Government's case.

The second two counts depended solely on the

rior to trial, the Government had become aware of the fact that Mr. Schiaffino at the least did not intend to testify as the Government wished and probably would not testify at all, claiming his Fifth Amendment privilege.

As a matter of fact, the motion to dismiss counts 3 and 4 are made precisely on that basis, on the ground the Government would not be able to take those actions to trial, and it would prejudice the defendant to even have that mentioned. The day before the opening statement, after the jury had been sworn, the Government became aware of the fact that Mr. Schiaffino had in fact disappeared. At that point, the Government asked your Honor for "...a few days in which to find Mr. Schiaffino...."

Your Honor said, "No, this case is going to proceed. You will make your opening statement. When and if you come to that point in the case where you need Mr. Schiaffino then you make your motion. I am not going to give you a continuance at this point."

So the Government was aware of the fact that it wasn't going to have time, at that point at least, to find Mr. Schiaffino. And the Government had said that they intended to put him on the following day

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because this was going to be, I believe, a fairly brief case. The first two counts were basically going to be the Court Reporter reading the grand jury minutes. Then there were going to be FBI agents. That very day of opening Mr. Schiaffino would be put on the stand.

The following day just before opening, and after your Honor had indicated the problems about counts 1 and 2, namely the lack of materiality, the Government again said Mr. Schiaffino has not been found.

And your Honor said, "You open. You take this case to trial right now. We will decide later on when and if you get to that point."

So that was the basis and the background under which Mr. Shanley began his opening.

During his opening, Mr. Shanley committed three separate errors, each one becoming more egregious, and without knowing precisely what was going on in Mr. Shanley's head, I think we can see from the record that what had happened here is that Mr. Shanley knew that his case was going down the drain. He knew that he had no case on counts 3 and 4 because Mr. Schiaffino was not around, and he knew there was a good possibility that counts 1 and 2 were going out the window on the ground of materiality.

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THE COURT: Of course, as a positive fact Mr. Schiaffino at the present time is sitting right in the courtroom.

MR. BRENNER: Absolutely, your Honor.

THE COURT: You are aware of that.

MR. BRENNER: Yes, I am aware of that and I --

THE COURT: You keep bringing it up. But let the record show also that Mr. Schiaffino is presently in the courtroom and he is here for the purpose of trial.

MR, BRENNER: It is interesting that by obtaining a mistrial the Government has accomplished precisely what it could not have accomplished if the mistrial had not been obtained because to the best of my knowledge Mr. Schiaffino was not found in time for him to have been a witness at the trial, according to the original trial.

THE COURT: Yes, Mr. Schiaffino came the day after. He was here the day after the mistrial was declared.

MR. BRENNER: That is correct.

THE COURT: And it seems to me that he would have been present in time to be a witness, I would think.

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Let me say this, your Honor: First of all, even if he would have been found in time to have been a witness, if the Government was not aware of this, as they were not at the time of opening because they did not know whether or not they could find Mr. Schiaffino or not, but if they were not aware of that fact and deliberately provoked a mistrial, then they shouldn't be permitted to benefit by virtue of the fact that they were lucky enough to get Mr. Schiaffino in afterward. And that basically is our position --

THE COURT: I wouldn't agree that there was a deliberate provoking under those circumstances based on Mr. Schiaffino as to whether or not he would or would not be a witness. I wouldn't agree with you on that point.

MR. GALLINA: May I just give your Honor some facts which Mr. Brenner is not aware of at this time? I only learned of them this morning. That it was after the mistrial was declared that Mr. Shanley or members of his staff put quite a bit of pressure and threats to the attorney for Mr. Schiaffino. Subsequently, Mr. Schiaffino received a phone call from his attorney or somebody, and Mr. Schiaffino appeared in the U.S. Attorney's Office, or appeared

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to be recognized to the U.S. Attorney. It was only after the mistrial was declared --

THE COURT: That Mr. Schiaffino appeared.

MR. GALLINA: That is correct. And that also that the U.S. Attorney was able to locate Mr. Schiaffino. That they didn't locate him prior to the mistrial.

THE COURT: I am aware of this. Thank you, Mr. Gallina.

MR. BRENNER: Well, let me say, your Honor, we do allege based on our reading of the record that what Mr. Shanley did was a deliberate provocation of a mistrial in order to obtain time to find Mr. Schiaffino, We would nevertheless argue that even if it were not deliberate that the errors that were committed during the opening were so egregious that the Government should be barred nonetheless.

And let me proceed to the three errors that occurred. The first one was that having been advised of the fact that Mr. Schiaffino was not at that point available, and having previously stated to the Court that Mr. Schiaffino was going to take the stand that day, that very day of the opening, at least according to the Government's thoughts on the matter, and knowing that he couldn't prove counts 3 and 4, the

Government nonetheless began to read the indictment which was going to include a recitation of counts 3 and 4.

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At that point Mr. Gallina objected. Your Honor specifically directed Mr. Shanley not to read the indictment but at most to summarize what he was going to prove because your Honor felt, and I believe rightly so, that a reading of the counts, especially if two of them were not going to be proved, it might very well prejudice and inflame the jury because if they were told that there were four counts and the following day when Mr. Schiaffino does not appear, as would have been the case if the timetable had gone off that way, then two of the counts were taken away and there would have been prejudice. So that the first thing that Mr. Shanley did, knowing he couldn't, according to his own timetable produce Mr. Schiaffino, he nonetheless was going to tell the jury about counts that he knew he couldn't prove. That was No. 1.

No. 2, he told the jury that these underlying charges, the '71 gambling arrest, the charge which underlay the entire basis for the four-count perjury indictment had been dismissed because the evidence was insufficient. Mr. Gallina again approached the bench and accused the Government of knowing that the

charges had been dropped against Mr. Caputo because he was innocent and not because the case was weak, but because the case was non-existent. And he accused Mr. Shanley of trying to imply to the jury, as your Honor later said Mr. Shanley was trying to do, that maybe Mr. Caputo was guilty but because of some technicality the case had been dismissed, and Mr. Shanley responded, oh, the defendant's grand jury minutes will support me. He told the grand jury the case against me was weak. Mr. Gallina said, "I don't recall that in the

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grand jury minutes at all."

Your Honor gave him a recess to re-read it.

Sure enough, when he came forward with the grand juryminutes what you have Mr. Caputo saying was that my arrest was phoney. It was a lie. I never did it. There was not a single shred of evidence to support Mr. Shanley's statement either that the charge had been dismissed for insufficiency or that Mr. Caputo had told the grand jury that was the reason they had been dismissed.

And at that point your Honor cautioned Mr. Shanley and said that you cannot make statements in this court which imply as an established fact something which is not true at all, or at most is going

Now we come to the third and most egregious error, an error which I put in my memorandum motion papers. And I do not think it is hyperbole, a first-year law student wouldn't make this error,

Mr. Shanley said to the jury, "...this man, Mr. Caputo was asked to take a lie detector test and he refused."

Mr. Gallina got up and said, "Your Honor, I move for a mistrial. I don't think I have to say anything more."

And I think he was correct. Lie detector results are not admissible in federal court. How much less is refusal to take something when the results of the test taken are inadmissible, particularly when you are dealing with a possible Fifth Amendment violation?

At this point, to put it bluntly, I think your Honor had had it. You declared a recess. Upon coming back from the recess you said to Mr. Gallina, "Make your motion."

Mr. Gallina said, "I move for a mistrial."

And you granted it.

To be perfectly honest, I think at that point Mr. Gallina's request for the mistrial was but a formality. I think your Honor would have granted --

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would have declared a mistrial whether there had been a request or not.

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The cumulative effect of these three errors getting worse and worse and worse was such that this jury was just completely prejudiced. There was no way -- this jury was totally tainted. There was no way that Mr. Caputo was going to get a fair trial.

In fact, we have cited two cases in our memorandum, and the third case which I have cited to your Honor -- two cases in the memorandum are Downum v. United States. I believe the citation for that is 377 -- 372 U.S. 734, and this was at page 5 of our memorandum, and Cornero v. United States 48 F. 2d 69. That is a Ninth Circuit case 1931. Those two cases together with McNeal v. Hollowell stand for the proposition that if as a result of inadequate trial preparation, sloppy preparation, whatever you will, if at the time the U.S. Attorney makes his opening statement, he knows or should have known that he is not going to have a witness, then he takes his chances. And if that witness doesn't appear as of the time that he is supposed to jeopardy is going to attach, and double jeopardy will prevent the re-trial,

I suggest that with that principle in mind

Mr. Shanley deliberately provoked a mistrial. He said,

He said, "We will take our chances," the exact language which the Supreme Court referred to in Downum. If the Government takes its chances and loses jeopardy has attached. And what we are saying is that having failed to obtain the presence of this witness, knowing that those counts were going to be dismissed, and knowing that if it could only have a few more days which your Honor had indicated it might not get, that they probably could locate Mr. Schiaffino, he deliberately provoked a mistrial.

That basically is the sum and substance of our argument.

I would point out one small line in McNeal v.

Hollowell which was adopted by the Supreme Court in

the Downum case where they spoke about -- this was a

situation where the Government nolle'd a case and then

tried to re-try the defendant. And what the Supreme

Court said, quoting from this case, was that to

permit this kind of practice where the Government

could get out of a case that was weak would "seem to

create a situation with a tantalizing potential for

prosecutorial misconduct."

I think that is precisely what happened here.

If we permit the Government to provoke a mistrial by egregious errors, errors that no lawyer would ever make, and then permit them to re-try the defendant, we are going to give them the opportunity to re-try cases until they are in the stance where the defendant is going to be forced to plead guilty or simply be worn down by repeated trials.

So we would move to dismiss the indictment on the ground that the double jeopardy prevents any further prosecution of Mr. Caputo.

THE COURT: Thank you.

Mr. Shanley, since this motion of course has just been brought on by the defendant and you haven't had an opportunity, I will give you an opportunity to submit a reply brief.

MR. SHANLEY: Thank you, your Honor.

THE COURT: I know that you are just getting this matter. But of course you were here and a lot of what Mr. Brenner said was a repetition of what happened. You know what happened and I know what happened. But you may proceed.

MR. SHANLEY: Well, your Honor, I would think there is no question that if your Honor feels that this mistrial was deliberately provoked by the Government, that your Honor in the exercise of your

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wisdom and discretion should dismiss this indictment. There is no question of the law --

THE COURT: Well, I will be very frank with I do not think that is what you did. I will be very frank with you and say I do not think that is what you did. I do not feel that was your attitude. It didn't show anything of that nature. It showed something else, but I do not feel you deliberately provoked it.

MR. SHANLEY: Your Honor, I would like to point out that some of the facts which were -- or indisputable facts at the time that the mistrial occurred which I have noted down. These facts were, on the morning of the 6th in the United States Courthouse in my office or standing outside the door of this courtroom there were five witnesses for the Government whom I had told to appear on that day, Thursday morning.

THE COURT: There is no question you were prepared for trial. The only witness that maybe there was aquestion on is Mr. Schiaffino. You were prepared. And actually as this thing worked out it would have seemed to be from what happened subsequently that Mr. Schiaffino would have been here. Now when he would have gotten here I don't know. I

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MR. SHANLEY: But as of Monday morning, the Government fully expected Mr. Schiaffino to appear that afternoon at 3:00 o'clock when he was supposed to appear.

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And we proceeded with the opening -- with the picking of the jury. And if I had known at that time that he was not going to appear, that he had taken off, it would have been a different situation, but I knew --

THE COURT: He would have appeared and the Government in this situation was not a guarantor of Mr. Schiaffino being here Monday, but the understanding was that he would appear for you. The Court is well aware of this.

MR. SHANLEY: Well, as far as the -- if your Honor feels that the Government did not precipitate this and your Honor has indicated that, then there is no ground for a dismissal of this indictment on the ground of double jeopardy because the defendant moved for it and consented to it. This is not the Loponzino case, United States v. Loponzino, which was just decided recently by the Second Circuit where one of the defendants said, "I do not consent to it." And there was a problem there which the Second Circuit went into as to whether or not there was a consent.

If Mr. Caputo had not consented -- had not consented to this mistrial on Thursday it would be a completely different ballgame. But he did consent, your Honor. And once having consented --

THE COURT: The reason he makes the motion is because your actions in your opening was so highly prejudicial that in good conscience for the benefit of his client he was required to do this.

MR. SHANLEY: Right, your Honor, but having done that, and the mistrial having been granted, it is my position, which I will research a little more thoroughly for your Honor, that at this point jeopardy — the only point is the Government's deliberate attempt to precipitate this mistrial — and it has

been decided by your Honor that it was not deliberate there is no argument for a possible jeopardy at this.

THE COURT: I will let you speak again (addressing Mr. Brenner).

MR. BRENNER: Thank you.

THE COURT: From watching the Government, and the Court's viewpoint as an observer, it doesn't appear to me that you deliberately did this. I think you had good intentions but that wasn't the way it came out. I think you were completely wrong in what you did. There is no question in my mind. I do not think that you did it deliberately. I do not think there was anything deliberate on the Government's part under the circumstances as they were before the Court.

Yes?

point.

MR. SHANLEY: I would point out to your Honor that United States v. Bando --

THE COURT: Put it in your memorandum.

MR. SHANLEY: I will put it in my memorandum.

But one of the statements which was elicited from a

Government agent on direct examination was that the

defendant had agreed to take a lie detector test and
then had refused. In that case the Court struck the

second part of the statement with instructions to the

jury that there is a difference -- words to the effect there is different proof as to the scientific validity of a lie detector test. But what I am saying in that case is that the error was cured by an appropriate instruction from the Court.

an opening and make appropriate instructions for obvious mistakes which you make. I gave an appropriate instruction for the second mistake which you made. But I can't continually use this as a way of running a court. And don't you expect that I will have to, because you must expect that you will present your case properly and that the Court will not be required to intervene or to more or less prohibit the prejudice which you inject into a situation.

MR. SHANLEY: Yes.

THE COURT: And under no circumstances should you feel that I can continually give instructions in order to correct mistakes which you make and you should expect that that is the way I will do things.

MR. SHANLEY: Yes, your Honor, I would certainly expect that.

THE COURT: I think Mr. Brenner wants to say something additionally.

MR. SHANLEY: Well, your Honor, this is just an overview of the brief that I haven't had time -- what I do feel is that the thrust of any motion at this point is the Government's deliberate attempt to incur a mistrial. And the added factor that there might still be jeopardy attached if the Court has decided that it was not a deliberate attempt by the Government I haven't researched that yet, but I have researched it to some extent and I do not think there are any grounds for that.

THE COURT: Thank you.

Yes, Mr. Brenner?

MR. BRENNER: I would point out to your Honor a few things: First of all, while the main thrust of our motion was that the Government's action was deliberate, we feel that even if it was not, that double jeopardy is to prevent a retrial because otherwise what we have is a situation where defense counsel is put on the horns of a dilemma. He has got obviously prejudicial statements by the Government. He can either sit back and let a tainted jury hear the case, or he is held to have waived his double jeopardy protection. And I do not think you can properly put defense counsel on the horns of that kind of dilemma.

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I think you are forced to give up one constitutional right in order to vindicate another.

Secondly, I would point out to your Honor that while Mr. Gallina himself as Mr. Caputo's attorney did make a motion for a mistrial, Mr. Caputo himself was totally satisfied with the jury and wanted that particular jury.

And again, if you are going to give the

Government the ability to say while it is true we

committed error and it is true that a mistrial had to

be declared, but we can still re-try the man, then

you are depriving an attorney of the ability really

to defend his client because the Government can do

that ad infinitum, and every time defense counsel had

to make the motion which the Government brought about

deliberately or not, the effect is the same,

Mr. Caputo sits through a second trial, a second jury

being sworn.

(continued next page)

MR. BRENNER: (Cont.) The things that the double jeopardy situation are supposed to prevent were being exposed to; whether it was deliberate or not on the part of the Government, I do not think that is a situation that should stand.

THE COURT: I would say if this were the second occasion of repeating the same type of action by the Government, I would have to give great weight to what you are saying. But I am not so sure under the circumstances -- what I will do is I will await the Government brief.

How soon do you think you can get that in, Mr. Shanley?

MR. SHANLEY: I would like a few days.

THE COURT: All right, I will await the Government's brief and I will reserve decision on this motion.

There will be a second call of this case. I will call it again this morning.

(Short recess.)

(After recess.)

MR. PATERSON: May I tell Mr. Schiaffino to go home?

(Short recess.)

MR. BRENNER: If you want to recall the case, Mr. Gallina is just outside and I can call him in.

THE COURT: Yes, better call him in, and I had better put it down for a date.

Call the case.

(After recess.)

THE CLERK: U.S. v. John Caputo.

THE COURT: The Court will go to trial on the other case with four defendants which is before the Court. I will have to put this over for another date. I will put it over to November 24th.

MR. GALLINA: November 24th? Thank you, your Honor.

THE COURT: I will give him two days on his motions.

MR. GALLINA: Thank you, your Honor.

Would your Honor, so there is no surprise in any way -- I want your Honor to understand under U.S. v. Beckerman the defendant intends to ask your Honor for a stay pending appeal of the motion.

THE COURT: Do you want to appeal this?

MR. GALLINA: Yes, we will, in accordance with
your schedule.

THE COURT: What we will do, then, is I will give the Government until -- would you want until

	Thursday? I don't want to push you.
	MR. SHANLEY: Now, if it is November 24th
	THE COURT: Do you want until Friday?
	MR. SHANLEY: I would like a week.
	THE COURT: Will Friday give you enough time?
6	MR. SHANLEY: I should have it by Friday, yes,
7	your Honor.
8	THE COURT: That is the 14th.
9	MR. BRENNER: Could I have until Tuesday to
10	reply , if I want to, depending upon what he says?
11	THE COURT: That would be the 18th for reply
12	by the moving party. And the case is over to the 24th
13	MR. GALLINA: Thank you.
14	THE COURT: I shouldn't have a problem. You
15	will have a decision shortly after the 18th when your
16	papers are in.
17	That is the 24th, Mr. Schiaffino.
18	Thank you for coming.
19	MR. GALLINA: May I for the record indicate
20	something so that it is in the record, that I had an
21	opportunity today to speak to Mr. Schiaffino's
22	attorney and Mr. Schiaffino for the first time in my
23	life.
24	THE COURT: And who have been in court.
25	MR. GALLINA: I spoke to them in court in front

of your Honor and in front of the prosecutor.

THE COURT: Right.

MR. GALLINA: Thank you, your Honor.

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AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS AND MEMORANDUM OF LAW DATED NOVEMBER 14, 1975

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS

JOHN CAPUTO,

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INDICIMENT

74 CR 621

Defendant

RICHARD L. SHANLEY, being duly sworn, deposes and says:

- That he is a Special Attorney for the United States Department of Justice, in charge of the prosecution of the aforesaid case.
- 2. The trial of the aforesaid case was scheduled to commence on November 3, 1975, at 10:00 a.m.
- 3. On the morning of November 3, 1975, a jury was duly impanelled and then excused by the Court until November 5, 1975, at 9:30 a.m.
- 4. During the morning of November 5, 1975, your deponent directed Special Agent James Mulroy to advise Denis Peterson, Esquire, counsel for material witness Joseph Schiaffino to inform Mr. Schiaffino not to come to this Court on that day but rather on November 5, 1975, at 11:00 a.m.
- 5. Your deponent on Wednesday, November 5, 1975, before coming to Court, was advised by Denis Peterson that Joseph Schiaffino had gone hunting on the previous day.
- 6. On November 5, 1975, counsel for the defendant John Caputo moved for discovery of alleged "Brady" material and this Court directed your deponent to turn over to it certain material for in camera inspection.
- 7. Shortly thereafter, your deponent handed up to the Court partial compliance with its order and completed compliance by the following morning.
- 8. During the course of the proceedings on that day, your deponent advised the Court that Joseph Schiaffino was a fugitive.

- This Court advised the parties that it had another matter in the afternoon and the trial was adjourned until November 6, 1975.
- 10. At midday, November 5, 1975, a bench warrant for the arrest of Joseph Schiaffino was ordered by this Court.
- 11. Your deponent advised this Court on November 6, 1975, that Joseph Schiaffino had not been located, and this Court directed the Government to proceed with the trial.
- 12. On November 6, 1975, your deponent had five witnesses standing by in the Federal Building, who were to testify in the aforesaid trial.
- 13. On that same date before your deponent commenced his opening statement, he requested and received from the Court, permission to retrieve his notes which had been left in his office.
- 14. Your deponent made no effort whatsoever in the few minutes he was out of the courtroom to locate any witness, nor would he have done so without first informing the Court of his intentions.
- 15. Upon his return to the courtroom, your deponent began his opening statement.
- 16. During the course of his opening statement, your deponent stated that defendant refused to take a lie detector test, and the defendant moved for a mistrial.
- 17. Your deponent attempted to justify his position to this Court by pointing out that he would have qualified the statement by stating that the defendant had no faith in such a procedure and had told the agents that he would have gone before a priest.
 - 18. After a recess, this Court declared a mistrial.
- 19. After the jury was discharged in response to this Court's inquiry, your deponent stated "I am ready to pick another jury "your Honor".
- 20. Upon learning that there was no more jurors available, this Court adjourned the commencement of a new trial until November 10, 1975.
 - 21. Your deponent had no intention whatsoever to abort the trial.
- 22. Your deponent acted in good faith during the course of the trial and this affidavit is made in good faith.

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WHEREFORE, your deponent requests that the motion to dismiss the indictment be denied.

Re Ral & Spanding

RICHARD L. SHANLEY, SPECIAL ATTORNEY UNITED STATES DEPARTMENT OF JUSTICE

Sworn to before me this 14¹³ day of November, 1975

Term enpires 3/30/77 #4 504019

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-V-

74 CR 621

JOHN CAPUTO,

Defendant

MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS INDICTMENT

Respectfully submitted,

David G. Trager United States Attorney Eastern District of New York

David Margolis Attorney-in-Charge Organized Crime and Racketeering Section, Criminal Division

By: Richard L. Shanley Special Attorney (Of Counsel) UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-V-

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS INDICTMENT

74 CR 621

JOHN CAPUTO,

Defendant

PRELIMINARY STATEMENT

The defendant John Caputo moved this Court on November 10, 1975, to dismiss the indictment against him on the ground that further proceedings against him are barred by the double jeopardy prohibition of the Fifth Amendment to the United States Constitution.

The grounds for his motion are that the prosecutor deliberately precipitated a mistrial during his opening statement.

This allegation is untrue and the motion should be denied.

FACTUAL BACKGROUND

A True Bill was returned on October 7, 1974, against the movant John Caputo, charging him with four counts of making false declarations before a Grand Jury in the Eastern District of New York, in violation of Title 18, United States Code, Section 1623. Upon arraignment on October 11, 1974, before Chief Judge Jacob Mishler, the Government announced that it was "ready for trial" and turned over to the movant all recorded statements of the movant which were available. The movant was given thirty days for motions and a trial date of January 5, 1975 was set. Shortly thereafter, the trial date was changed to February 24, 1975 and eventually

the case was transferred to this Court.

On February 20, 1975, this Court signed an Order immunizing Joseph Schiaffino in anticipation of his testimony at trial. Mr. Schiaffino at that time was avoiding service of a trial subpoena upon him. Mr. Schiaffino surrendered to the Federal Bureau of Investigation on February 20, 1975, and was released on his own recognizance by Magistrate Schiffman. On February 24, 1975, the witness was told by this Court to be available to testify on two hours notice from his attorney, Denis Peterson.

The defendant John Caputo made numerous motions to dismiss the indictment and also to supress certain statements made by Mr. Caputo to agents of the Federal Bureau of Investigation. These motions were argued on February 24, 1975, and an evidentiary hearing commenced on that date. The hearing ended on February 26, 1975, at which time trial of the case was scheduled for April 14, 1975. On that date also, the defendant waived his right to a speedy trial. On March 13, 1975, the Court issued a Memorandum and Order denying the movant's motions to supress certain statements.

The trial date of April 15, 1975, was adjourned until May 5, 1975, upon motion by the Government that the attorney handling the case was engaged in trial. On May 5, 1975, the trial was adjourned until May 27, 1975, upon request of the movant. On May 27, 1975, the trial of the case was adjourned until July 21, 1975, upon request of the movant. On July 21, 1975, the trial was adjourned at movant's request until September 29, 1975. On September 29, 1975, the trial was adjourned until

October 14, 1975, at the request of the movant. On October 14, 1975, this Court adjourned the trial until October 20, 1975. And, on October 20, 1975, the trial was adjourned until November 3, 1975, at the movant's request.

The trial of this case commenced on November 3, 1975, when a jury together with two alternates was picked. The jury was then excused until November 5, 1975, at 9:30 a.m. On that date, the movant sought discovery of alleged "Brady" material. Subsequently, the Government turned over to this Court three envelopes containing the Federal Bureau of Investigation investigative file, Grand Jury testimony, and sundry other material for in camera inspection. On that same date, the Government was advised by attorney for Joseph Schiaffino that Mr. Schiaffino had gone hunting. A bench warrant was issued by this Court. Earlier in the day the trial had been adjourned until Thursday, November 6, 1975.

The following day, November 6, 1975, this Court denied movant's request to inspect two of the three envelopes submitted, and reserved decision on the third untilits contents had been examined. On that date, after advising this Court that Mr. Schiaffino was still among the missing, the Government began its opening statement. Movant requested for a mistrial shortly thereafter on the ground that the prosecutor had misstated the evidence concerning the dismissal of the 1971 gambling charge against John Caputo and had incurably poisoned the minds of the jury against him. This motion was denied [11/6/75 TR p. 77]. During his opening, the prosecutor stated that to the jury that John Caputo had refused to take a lie detector test, and upon the motion of counsel for

Mr. Caputo, a mistrial was granted [11/6/75 TR p. 95]. Shortly thereafter, the Government stated that it was ready to pick another jury. [11/6/75 TR p. 95] However, there were no jurors available, so the case was put over until Monday, November 10, 1975. On that date, John Caputo moved to dismiss the indictment against him on the grounds of double jeopardy. Counsel for the Government were served with the motion papers in the courtroom and oral argument ensued. This court gave the Government until Friday, November 14, 1975 to file answering papers, and also allowed movant until Tuesday, November 18, 1975 to file any reply.

THE CLAIM OF DOUBLE JEOPARDY IS UNAVAILABLE TO THE DEFENDANT

It is well settled that absent prosecutional misconduct, consent to the declaration of a mistrial bars a later resort to a plea of double jeopardy. United States v. Gori, 282 F.2d 43, 47 (2d Cir. 1960), aff'd 367 U.S. 364; United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973); see also, United States v. Tateo, 377 U.S. 463, 467 (1964).

And where for reason "deemed compelling by the trial judge . . . the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." Gori v. United States, 367 U.S. 364, 368 (1961); Wade v. Hunter, 336 U.S. 684 (1949); United States v. Gentile and LaPonzina, F.2d , slip op. 239 (2d Cir. 1022/75).

Accordingly, whether the defendant consented or not is immaterial to the instant case. For this Court found compelling reasons for the declaration of the mistrial. [TR 11/6/75 pp. 94, 95]

A double jeopardy defense can prevail when a mistrial is deliberately precipitated by the prosecuto. Gori v. United States, supra; United States v. Gentile and LaPonzina, supra.

The movant has asked this Court to conclude that the statement by the prosecutor which precipitated the mistrial was a deliberate attempt to gain time so that "he could locate his missing witness and save his case". [p. 8 Memorandum]

This memorandum is not directed at justifying the prosecutor's

statement. However, the impact of the intended whole statement [11/6/75 TR p. 89] most certainly would not have been as prejudicial as the partial statement. See <u>United States v. Bando</u>, 244 F.2d 833, 841 (2d Cir. 1959).

The thrust of movant's claim is that the absence of Mr. Schiaffino was the motivating factor which caused the prosecutor to bring on the mistrial.

Despite the averments of Mr. Gallina, the Government fully expected Mr. Schiaffino to testify at the trial. Mr. Schiaffino never stated in open court that he would not testify. The one day Mr. Schiaffino appeared in Court was on February 24, 1975, at which time he had nothing to say to the prosecutor. The witness also had very little to say to the Court [2/24/75 TR p. 36].

It is true that at some time later, the prosecutor had been informed by the witness' counsel that Schiaffino told him that he, Schiaffino, would not testify. However, the prosecutor, shortly before the trial was to commence, had been informed by other sources that Mr. Schiaffino would testify. Be that as it may, the Government has a right to expect that a witness will adhere to testimony previously given. United States v.

Graham, 102 F.2d 436 (2d Cir.) cert. denied 307 U.S. 643 (1939).

In that case, the Court aptly pointed out: "It is one thing to threaten not to testify and quite another to carry out the threat when put to the test." [p. 442]

There can be no doubt that on Thursday, November 6, 1975, Mr. Schiaffino was still among the missing insofar as the Government was concerned. However, the representations of his counsel, Denis Peterson on the day previous were that Mr. Schiaffino's absence was not wilful and that his return was imminent:

The Court: Do you have anything to say as to this, Mr. Peterson?

Mr. Peterson: Yes, Judge.

Mr. Shanley indeed has always informed my office as to when Mr. Schiaffino must be in Court.

On every prior occasion Mr. Schiaffino was available to be in this Court.

It seems to me, Judge, that if there is fault at all, it might very well be mine in this respect:

On Monday, indeed, Mr. Shanley notified my office that it was adjourned from 2:00 p.m. Tuesday until 10:00 o'clock this morning.

Now, there have been prior adjournments, the number of which I don't know, I would estimate four or five, possibly six.

My secretary called up Mr. Schiaffino's house on Monday and said, Don't be in on Monday at 2:00.

Now, she probably did not say, Yes, be here at 10:00 o'clock Wednesday morning.

I called Mr. Schiaffino's residence yesterday at the last minute because I in fact did suspect another adjournment,

as it has been adjourned in the past.

Mr. Schiaffino has always been available except for this time, Judge.

I am certain his nonavailability was not intentional and just invertent.

The Court: Well, do you think there is any way we can get him in or - -

Mr. Peterson: Judge, he might very well be back this afternoon, I don't know. [11/5/75 TR pp. 46, 47]

There also can be no doubt that the Government on the morning of November 6, 1975, had five witnesses standing by to testify in the Federal Building at the trial. This fact would seem to indicate that the prosecutor intended to proceed as far as he could with the trial.

Furthermore, the Government had no reason to believe that this Court would not have granted a reasonable continuance of the trial if Mr. Schiaffino was unavailable when the appropriate time came for him to testify. [11/6/75 TR p. 55]

The prosecutor's subsequent conduct belies the claim that he deliberately aborted the trial. For most assuredly, unless he was blessed with the gift of omniscience (i.e. that there were no more jurors available), the prosecutor would not have, almost in his next breath after the declaration of the mistrial, informed this Court that he was ready to pick another jury.

MOVANT'S ORAL CLAIM THAT HE WAS ON "THE HORNS OF A DILEMMA" HAS NO VALIDITY

Movant's counsel in oral argument would have this Court believe that he had been on the "horns of a dilemma" as to whether or not he should have asked for a mistrial, thus waiving the double jeopardy claim, or sat back and let a tainted jury hear the evidence [11/10/75 TR pp. 25, 26], and accordingly, he will be oppressed by successive prosecutions and a rigid double jeopardy rule should apply. He may well have been on the "horns of a dilemma", but that makes no difference as to this claim of double jeopardy. However, the fact of the matter is that a mistrial may be declared by the Court without his consent and without jeopardy attaching. Gori v. United States, supra. This could well have happened in the case at hand. For, it is this Court who was in the best position to determine whether there was "manifest necessity" to abort the trial. United States v. Perez, 9 Wheat (22 U.S.) 579 (1824). And, a "mechanical rule prohibiting retrial when ver circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which a mechanical rule would provide". United States v. Jorn, 400 U.S. 470, 480 (1971).

In the case at bar, the defendants' exposure at trial was approximately three hours. There are numerous cases where a defendant was exposed to multiple trials and double jeopardy did not attach. See Keerl v. Montana, 213 U.S. 135 (1909) (3 trials); United States v. Luis Castellanos, 473 F.2d 749 (2d Cir. 1973) (2 trials); United States v. Persico, 425 F.2d 1375 (2d Cir.) cert. denied 400 U.S. 869 (1970) (5 trials). Accordingly, even

if the defendant had not asked for the mistrial, a subsequent prosecution can in no way be considered oppressive prosecution.

CONCLUSION

For the reasons set forth in this Memorandum and attached Affidavit the motion by the defendant John Caputo to dismiss the indictment should be denied.

REPLY AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS DATED NOVEMBER18, 1975

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

IND. NO. 74 Cr. 621

REPLY AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT

JOHN CAPUTO.

Defendant.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

JOEL A. BRENNER, being duly sworn, deposes and says:

- I am of counsel to Gino E. Gallina, Esq., attorney of record for John Caputo, and am fully familiar with the facts and circumstances of this case.
- I make this affidavit in response to the affidavit in opposition filed by the prosecutor.
- 3. The primary thrust of our motion was that the prosecutor deliberately provoked a mistrial. In his affidavit in opposition the prosecutor denies this, but his memorandum in opposition undercuts his own denial. At Page 6 of the memorandum, the prosecutor cites <u>U.S. v. Bando, 244 F.2d 833, 841 (C.A.2, 1959)</u> as supporting the proposition that reference to a refusal to take a lie detector test is not always prejudicial error. While the holding of the Second Circuit was that this was not reversible error on appeal, it was also the clear holding of the Court that this was plain trial error.

 Since the prosecutor was presumably aware of the <u>Bando</u> case when he made the statement: "I did some research on this problem." (November 6, 1975

minutes, at p. 92), he deliberately made what he knew had been held to be an improper statement.*

4. Assuming, without for an instant conceding, that this statement was not deliberately made, it was so negligent as to amount to the same thing in law. In both U.S. v. Bryant, 439 F. 2d 642, 652-653 (C. A. D. C. 1971) and U.S. v. Consolidated Laundries Corp., 291 F. 2d 563, 570-571 (C. A. 2, 1961) it was held that negligence resulting in the loss of evidence usable by the defendant could deprive him of his right to a fair trial. Here, the gross negligence of the prosecutor deprived the defendant of an equally valuable right, that of proceeding before a jury he was satisfied with and affirmatively wanted. U.S. v. Jorn, 400 U.S. 470, 484 (1971).

WHEREFORE, it is respectfully requested that the motion to dismiss be granted.

JOEL A. BRENNER

Sworn to before me this

18th day of November, 1975.

^{*}At the least, being aware of the dangerous ground on which he was treading, and in view of the fact that he had been chastised twice in his opening already, the prosecutor should have advised the trial court of what he intended to say, so that the Court could rule, in advance. On the propriety of the statement. The fact that he ignored even this minimal safeguard is the equivalent of deliberate action. See, e.g., U.S. v. Hilton, 521 F. 2d 164, 166 n. 2 (and cases cited therein) (C. A. 2, 1975).

1:RLS:dtr 741660

AFFIDAVIT IN RESPONSE TO REPLYAAFFIDAVIT IN SUPPORT OF MOTION TO DISMISS DATED NOVEMBER 19, 1975

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- US-

JOHN CAPUTO.

AFFIDAVIT IN RESPONSE TO REPLY AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICT-MENT

74 CR 621

DEFENDANT

RICHARD L. SHANLEY, being duly sworn, deposes and says:

- 1. That he is a Special Attorney for the United States Department of Justice, in charge of the prosecution of the aforesaid case.
- 2. This affidavit is submitted in response to the affidavit filed by Counsel for the movant on November 18, 1975.
- 3. Your deponent was not aware of the holding in <u>United States</u>
 -v- Bando, 244 F.2d 833 (2d Cir. 1959), on the morning of November
 6, 1975.
- 4. If your deponent had been aware of the aforesaid holding the statement which caused the mistrial would not have been made.
 - 5. This affidavit is made in good faith.

Respectfully Submitted,

RICHARD L. SHANLEY
SPECIAL ATTORNEY
ORGANIZED CRIME & RACKETEERING
SECTION
U.S. DEPARTMENT OF JUSTICE

SWORN TO BEFORE ME THIS 19th DAY OF NOVEMBER, 1975.

A 165 MINUTES DATED NOVEMBER 24, 1975

1	MOTERALE HOTEPHER 24, 1975	
2	UNITED STATES DISTRICT COURT	
3	EASTERN DISTRICT OF NEW YORK	
4	x	
5	UNITED STATES OF AMERICA , :	
6	-against- 74-CR-621	
7	JOHN CAPUTO,	
8	Defendant. :	
9	х	
10		
11	United States Courthouse Brooklyn. New York	
13	November 24, 1975 10:00 o'clock A.M.	
14		
15	Before:	
16	HONORABLE HENRY BRANWELL, U.S.D.J.	
17		
18		
19		
20		
21	JOSEPH PARRYYA	
22	JOSEPH BARBELLA OFFICIAL COURT REPORTER	
23		
24		

25

for the Eastern District of New York

Appearances:

BY: RICHARD SHANLEY, ESQ. Assistant U.S. Attorney

DAVID G. TRAGER, ESQ. United States Attorney

GINO GALLINA, ESQ. Attorney for Defendant

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THE CLERK: United States of America v. John Caputo.

THE COURT: There is a pending motion on this.

MR. GALLINA: Yes, there is.

THE COURT: That motion is --

MR. GALLINA: A motion to dismiss.

THE COURT: On the double jeopardy?

MR. GALLINA: Yes.

THE COURT: The motion is denied. And there will be an opinion this morning that you will be able to take up.

MR. GALLINA: Thank you, your Honor.

THE COURT: All right.

MR. GALLINA: I intend to file a notice of appeal. May I have a -- I have it all prepared.

Actually, I just need a couple of days.

THE COURT: You can get that -- the opinion, this morning.

MR. GALLINA: All right.

THE COURT: And then you can file your papers.

MR. GALLINA: All right. Thank you very much.

THE COURT: All right. Anything else right now?

MR. SHANLEY: No, your Honor, except the Covernment is ready.

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THE COURT: Yes. Do you want me to put it down?

I don't know. What do you think?

MR. GALLINA: Well, I wouldn't think so. I'm going to file a notice of appeal which is already prepared.

THE COURT: Okay. I will just put that it is adjourned without date at this time.

MR. GALLINA: Yes.

THE COURT: All right. Thank you.

MR. GALLINA: Thank you.

MR. SHANLEY: Thank you, your Honor.

THE COURT: It will be ready this morning. You can pick it up. It will be a short opinion.

MR. GALLINA: Thank you.

* * *

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MEMORANDUM AND ORDER DENYING MOTION TO DISMISS (Bramwell, J.) DATED NOVEMBER 24, 1975

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA

-against-

74 CR 621

agains

MEMORANDUM AND ORDER

JOHN CAPUTO,

Defendant.

- x

BRAMWELL, D. J.

Defendant John Caputo moves to dismiss the indictment on the ground that further proceedings are barred by the Double Jeopardy Clause of the Fifth Amendment.

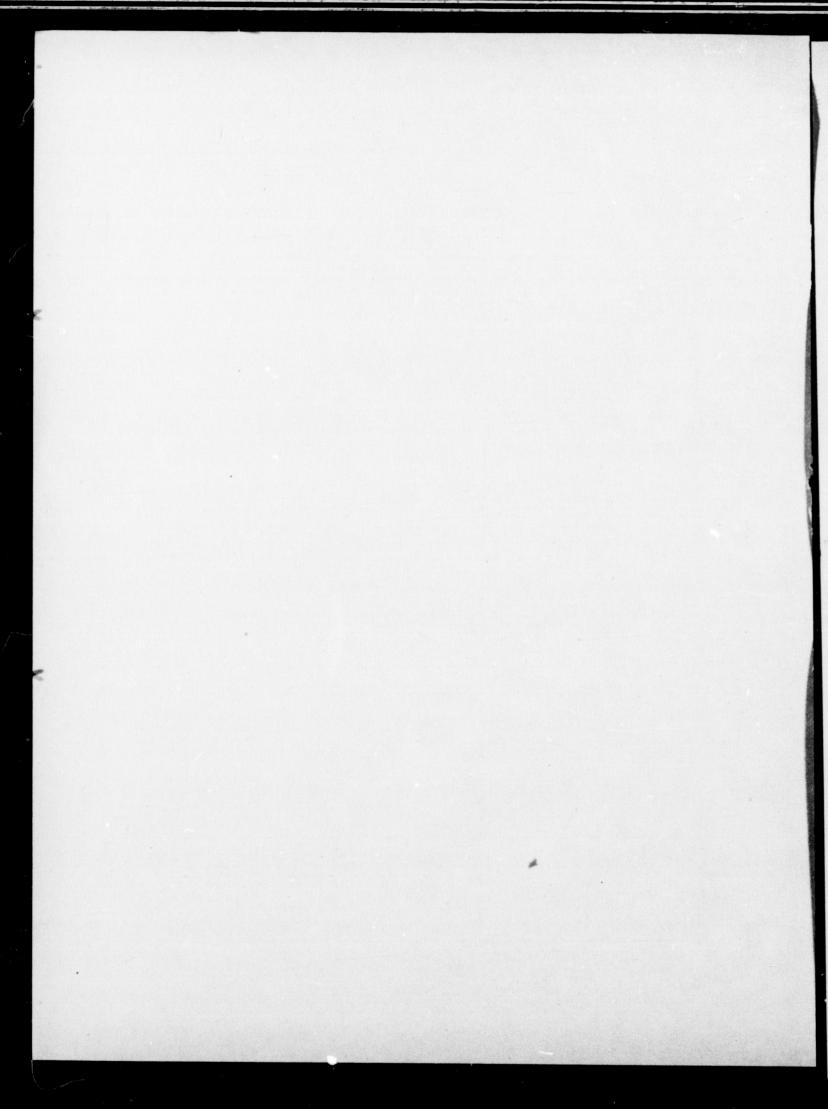
After numerous adjournments the trial of this? case commenced on November 3, 1975, at which time a jury was duly impaneled. During the course of the prosecutor's opening statement on November 6, 1975, this Court granted defendant's motion for a mistrial. Defendant now argues that the prosecutor deliberately committed error in his opening statement with the intention that the Court would be forced to declare a mistrial. Defendant contends that the intent of the prosecutor was to obtain a "post-jeopardy continuance" in order to strengthen his case and that, therefore, the Double Jeopardy Clause bars reprosecution.

As this Court declared a mistrial upon the explicit motion of defendant's counsel, the Double Jeopardy Clause does not bar the government from retrying the defendant. United States v. Jorn, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed. 2d 543 (1971); United States v. Tateo, 377 U.S. 463, 467-468, 84 S.Ct. 1587, 1590, 12 L.Ed. 2d 448 (1964); United States v. Goldstein, 479 F.2d 1061, 1066 (2d Cir. 1973), cert. denied, 414 U.S. 873, 94 S.Ct. 151, 38 L.Ed. 2d 113. This was not a case of "prosecutorial impropriety designed to avoid an acquittal". United States v. Jorn, supra, 400 U.S. at 485 n.12, 91 S.Ct. at 557. Although the prejudical remarks in the prosecutor's opening statement demonstrated considerable ineptitude, this Court does not find them to be the product of a purposeful scheme designed to compel a continuance. The prosecutor has demonstrated nothing less than good faith throughout the proceedings in this case. Indeed, he was willing to select another jury immediately after the mistrial was declared. Since this Court did not declare the mistrial sua sponte, it finds no need to discuss defendant's contentions regarding the "manifest necessity" doctrine. See Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961); United States v. Jorn, supra; Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973); United States v. Gentile, _F.2d_, slip op. 239 (2d Cir. October 22, 1975).

Accordingly, defendant's motion to dismiss the indictment is denied.

SO ORDERED.

Dated: Brooklyn, New York November 24, 1975



United States Court of Appeals FOR THE SECOND CIRCUIT

No. 75-1412

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES OF AMERICA

Appellee

WILLIAM J. BACHMAN
Notcry Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1978

v.

JOHN CAPUTO

Appellant

Stephen Zedalis,	being duly sworn, deposes and says, that deponent
is not a party to the action, is over 18 years of age and Flushing, N.Y.	resides at 47-19 194th Street
That on the day of Februa	ry, 1976, deponent
served the withinBrief and Appendix for	or Appellant
uponRichard Romero, Rsq.	
c/o George Gelinski; P.O.Box	899
Benjamin Frankl y n Station, Was	shington, D.C. 20044
Attorney(s) for the Appellee in the action, purpose by depositing a true copy of same enclosed office official depository under the exclusive care and within the State of New York.	in a postpaid properly addressed wrapper, in a post
	Stephen redalix

Sworn to before me,

_ day of _ February

